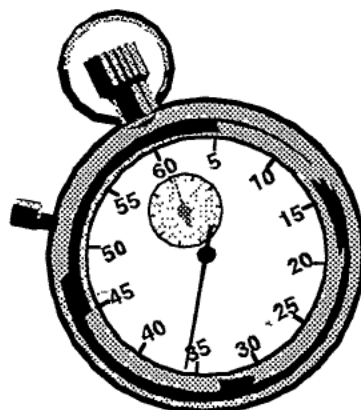


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TERM LIMITS

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TABLE OF CONTENTS

OVERVIEW	1
TERM LIMITS AND THE U.S. CONSTITUTION	1
Right to Vote	2
Ballot Access	2
Associational Rights	3
Conclusion	3
<i>BATES v. JONES</i>	3
Procedural History and Background	3
<i>Bates</i> Analysis-Full Ninth Circuit	4
Majority Opinion	4
Concurring Opinions	5
Dissenting Opinion	6
Conclusion	7
<i>Bates</i> Analysis-Three-Judge Panel-Appellate Court	8
<i>Bates</i> Analysis-District Court	9
Constitutional Implications	9
The State's Case	9
Holding	9
Conclusion	9
OREGON	10
Ninth Circuit Court of Appeals	10
Analysis	10
TERM LIMITS IN MISSOURI	10
Comparison of California and Missouri	11
Lifetime Ban	11
Lifetime Ban on Other Elected Officials	11
Voters Approved Term Limits	11
Nature of the Legislatures	11
Missouri Data	12
Missouri Legislature-Turnover	12
Campaigning-Missouri	13
Possible Analysis for Missouri Based on <i>Bates</i> Ninth Circuit Decision	13
Possible Analysis for Missouri Based on <i>Bates</i> Panel Appellate Decision	14
Possible Analysis for Missouri Based on <i>Bates</i> District Court Decision	14
Conclusion on Possible Analysis	15

TABLE OF CONTENTS (CONTINUED)

OPTIONS TO LIFETIME LEGISLATIVE TERM LIMITS	15
Rotation of Office (Non-Permanent Term Limits)	15
Place Term Limits on Those In Leadership Positions in the Legislature	16
Changing the Number and Proportion of House & Senate Districts	16
Extending the Number of Years of Lifetime Term Limits	17
Education of the Public in Civic Responsibility	17
Conclusion	18
TABLE OF AUTHORITIES	19

EXHIBITS:**(Compiled by Polly Clark)**

STATES WITH TERM LIMITS	EXHIBIT A
TOTAL STATE LEGISLATIVE SERVICE OF CURRENT SENATORS AND REPRESENTATIVES	EXHIBIT B
TOTAL LEGISLATIVE SERVICE OF CURRENT SENATORS	EXHIBIT C
TOTAL LEGISLATIVE SERVICE OF CURRENT REPRESENTATIVES	EXHIBIT D
CONSTITUTIONAL AMENDMENT NO. 12 -OFFICIAL BALLOT LANGUAGE	EXHIBIT E
INITIATIVE PETITION	EXHIBIT F
STATE SENATE AND HOUSE MEMBERS BY STATE	EXHIBIT G
ARTICLE III, SECTION 8, MISSOURI CONSTITUTION	EXHIBIT H

CASE LAW:

Anderson v. Celebrezze, 103 S.Ct. 1564, 460 U.S. 780, (1983)

Burdick v. Takushi, 112 S.Ct. 2059, 504 U.S. 428 (1992)

Tashjian v. Republican Party of Connecticut, 107 S.Ct. 544, 479 U.S. 208 (1986)

Legislature v. Eu, 54 Cal. 3d 492 (1991)

Bates v. Jones, Case No. 97-15864 (U.S. Court of Appeals, Ninth Cir. En Banc, Dec. 19, 1997).

Jones v Bates, 127 F.3d 839 (Ct. App., 9th Cir., Oct 7, 1997)

Bates v. Jones, Case No. C 95-02638 CW (U.S. Dist. Ct., N.D., Calif. Apr. 23, 1997)

Markham v. Keisling, Case No. 97-6237-TC (U.S. Dist. Ct., Oregon, Dec. 16, 1997)

U.S. Term Limits v. Thornton, 514 U.S. 779, 63 LW 4913 (1995)

OVERVIEW

The issue of whether term limits are constitutional has been the focus of *Bates v. Jones*, a recent federal case in California. The case was reheard and term limits were upheld by the full Ninth Circuit Court of Appeals on December 19, after an October 7, 1997, decision by a three-judge panel of the Court of Appeals threw out lifetime legislative term limits under a procedural due process analysis. The District Court had previously struck down lifetime legislative term limits on substantive constitutional issues. The case is expected to be taken to the U.S. Supreme Court. The Supreme Court should take this case because of the broad impact of term limits across the nation.

Currently, twenty-one states have adopted term limits for state legislators. Of these, fourteen have adopted non-lifetime term limits. See *Exhibit "A"*. These states usually require a break in legislative service after a given number of terms or years. Only seven states have adopted lifetime term limits, which is the focus of this report: Arkansas, California, Michigan, Missouri, Nevada, Oklahoma, Oregon. To date, California is the only state with state legislative term limits litigation that has reached a full Circuit Court. Oregon, also in the Ninth Circuit, is the only other state to bring a legal challenge to lifetime legislative term limits. The U.S. District Court in Oregon recently struck down term limits in Oregon, however, the decision was handed down prior to the upholding of California's term limits by the full Ninth Circuit. The Oregon case provides the Ninth Circuit Appeals Court with yet another opportunity to examine lifetime term limits. It is expected that any decision or appeal will uphold term limits in Oregon due to the precedent set by the full Ninth Circuit.

Term limits were passed in Missouri in 1992 and will generally begin impacting Representatives and Senators in 2002, although some legislators elected in special elections will be impacted sooner.

This report will briefly analyze constitutional issues inherent in the enforcement of lifetime legislative term limits, then will summarize the *Bates* full Ninth Circuit, three-judge panel, Appellate and District Court decisions and the recent decision in Oregon. A comparison of California and Missouri relevant to term limits will be made, since both states have lifetime term limits and both states passed their laws by initiative petition and the application of analysis used in the *Bates* decisions will be made to Missouri. Finally, an examination of other options in Missouri will be made.

TERM LIMITS AND THE U.S. CONSTITUTION

Term limits inherently involves constitutional rights associated with the election process, and therefore, potentially any election-related, constitutional issue could be advanced. Generally, election-related issues fall under the Fourteenth Amendment right to vote by qualified voters, and equal protection by candidates, which are deeply connected with the First Amendment freedoms of speech, assembly and association. Specifically, election related issues

can involve rights with respect to the right to vote, ballot access, party association, and the regulation of campaigns, including contributions and expenditures. In the case of term limits, the constitutional issues include all of the above, except campaign contribution and expenditure issues. Constitutional issues applicable to term limits will be examined below based on analysis from cases having precedential value on election-related constitutional rights.

RIGHT TO VOTE. Whenever the right to vote is at issue, the court must examine the "character and magnitude" of the injury and the State's legitimate interest in enforcing the burden, which is a flexible standard. *Anderson v. Celebrezze*, 103 S.Ct. 1564, 1570, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 112 S.Ct. 2059, 504 U.S. 428 (1992). The burden cannot be greater than necessary on the constitutional rights. *Id.*

In the application of lifetime legislative term limits, the burden exists where a voter who wishes to vote for an experienced legislator would not have that opportunity simply because that legislator is experienced.

States have the right to regulate the more procedural aspects of elections, such as the times, places and manner of holding elections, to ensure that elections are fair and honest. *Article I, Section 4, Clause 1, U.S. Constitution*. Prohibiting write-in candidates, for example, was held to be a reasonable, nondiscriminatory State regulation under *Burdick*. The State had a legitimate interest in prohibiting party raiding and unrestrained factionalism. Since any potential candidate could file as a party candidate or independent, no class of candidates was specifically being prohibited and the voters could select from any candidate choosing to participate in the filing process.

In the case of lifetime legislative term limits, the State is enforcing more than just a procedural regulation. With respect to lifetime term limits, the State is prohibiting voters who prefer experienced legislators from electing candidates of their choice, rather than just prohibiting a method of filing for candidacy. Once a candidate has served a specified number of years, that candidate may never again hold that office and voters cannot exercise the right to vote for the experienced legislator, which is a much greater burden than requiring another means of filing.

The more burdensome the restriction is on First and Fourteenth Amendment rights, the more narrowly drawn and compelling the State's interests must be. *Burdick*, 112 S.Ct. at 2063.

BALLOT ACCESS. Ballot access issues usually accompany right to vote issues, since the fact that the voter's right to vote inherently involves the candidate's right to access the ballot. A ballot access issue arises with respect to term limits because experienced legislators are denied access to the ballot. Ballot access cases generally look at "the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process." *Anderson v. Celebrezze*, 103 S.Ct. 1564, 1572, 460 U.S. 780, 793 (1983), quoting *Clements v. Fashing*, 102 S.Ct. 2836, 2844, 457 U.S. 957, 964. The class of candidates being excluded from the ballot in lifetime legislative term limits cases are experienced legislators.

ASSOCIATIONAL RIGHTS. Associational rights also tend to be linked with right to vote and ballot access cases. Usually these cases impact candidates and voters who are independents or smaller political parties. *Anderson*, 103 S.Ct. at 1572. Political parties generally have the right to put forth who they believe is the best candidate, and the State generally cannot interfere with the freedom of any political party to select its candidates. *Tashjian v. Republican Party of Connecticut*, 107 S.Ct. 544, 549, 479 U.S. 208, 215-216 (1986). Political parties who wish to exercise their freedom to select experienced legislative candidates are prohibited from doing so under lifetime legislative term limits.

CONCLUSION. The right to vote, ballot access and associational rights issues frequently accompany each other in election-related constitutional cases, and, as would be expected, are applicable in term limits cases. The more restrictive the burden on First and Fourteenth Amendment rights, the more narrowly drawn and compelling the State's interest must be. Lifetime legislative term limits prohibits voters who prefer experienced legislators from electing legislators of their choice, which is a substantial burden on those voters' constitutional rights. Experienced legislators, as well, are denied access to the ballot and political parties are prevented from choosing experienced legislators for nomination to office, solely because of the candidate's experience. Such restrictions on the constitutional rights of voters, candidates and political parties are very burdensome, which necessitates that the State show that it has a narrowly tailored and compelling interest in enforcing the burden. Additionally, the burden cannot be greater than necessary to meet the legitimate interest of the State.

BATES v. JONES

PROCEDURAL HISTORY AND BACKGROUND. In 1990, the California voters passed Proposition 140, a constitutional provision which enacted lifetime term limits for state legislators and nearly every state-wide elected office in the executive branch, modified legislative retirement, and limited the number of legislative employees.

In 1991, a case was brought before the California Supreme Court, which upheld Proposition 140, but stated that the provision was somewhat unclear as to whether the term limits were for life. In the California Supreme Court's conclusion, however, it held that Proposition 140 did in fact adopt lifetime term limits and that the limits were constitutional. The nature of the case focused on **legislative** term limits. *Legislature v. Eu*, 54 Cal. 3d 492 (1991). The case was **not** brought by Tom Bates, the State legislator who brought the *Bates v. Jones* case before the U.S. District Court, Northern District of California.

In 1995, Tom Bates, other State legislators and voters in those districts filed a case which was heard in the U.S. District Court for the Northern District of California.

On April 23, 1997, the U.S. District Court struck down lifetime legislative term limits, finding lifetime limits unconstitutional on its face due to violation of the First and Fourteenth Amendments of the U.S. Constitution, with regard to ballot access, the right to vote and the right of assembly. In short, the District Court had held that legislators cannot be permanently banned from running for office after serving a designated length of time.

The case was appealed and heard by a three-judge panel of the U.S. Circuit Court of Appeals for the Ninth Circuit. On October 7, 1997, the Appeals Court rendered its decision. *Bates v. Jones*, 127 F.3d 839 (Ct. App., 9th Cir., 1997). The District Court's decision striking down term limits was upheld, but the analysis was rejected by the three-judge panel Court of appeals, which held that the case first should be examined to see if there was a valid waiver under Procedural Due Process. The Appeals Court held that there was an invalid waiver of fundamental rights by the voters because they were not informed that the term limits would apply for a lifetime. Therefore, the Appeals Court held that the lifetime State legislative term limits provision failed under procedural due process (First and Fourteenth Amendments of the U.S. Constitution). In support of its holding, the Court stated that "Neither Proposition 140, the proponents' ballot arguments, nor the material prepared by the State mentioned "lifetime" term limits; thus, the voters were not afforded adequate notice of the severity of the limitation involved." *Bates*, 127 F.3d at 844.

On October 5, 1997, two days before the Appeals Court decision, the State (Jones) petitioned the U.S. Supreme Court to take over the case, which was denied.

On October 17, 1997, one of the Appeals Court judges called for a vote on whether an eleven-judge panel should rehear the *Bates* case.

On November 4, 1997, the eighteen-member Appeals Court voted to reconsider the three-judge ruling. Such a vote effectively suspends the injunction against enforcement of lifetime legislative term limits. The Court heard the case on November 20.

On December 19, 1997, the full Ninth Circuit Court of Appeals in the *Bates* case upheld term limits in a nine to two decision. Of the eleven judges who heard the *Bates* case, six judges wrote or joined in concurring or dissenting opinions, indicating a split among the court in the analysis behind the constitutionality of lifetime legislative term limits.

BATES ANALYSIS-FULL NINTH CIRCUIT. (*Bates v. Jones*, No 97-15864, U.S. Court of Appeals, Ninth Circuit, En Banc, December 19, 1997).

MAJORITY OPINION. In the majority opinion, the Court upheld lifetime legislative term limits as constitutional, in that there was no violation of First and Fourteenth Amendment rights. The majority stated in a very brief analysis of the term limits issue that any impingement on such constitutional rights was minimal, and that enforcement of lifetime state legislative term limits "is a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose." *Bates*, p. 8 of Thompson (majority) opinion. The Court rejected the three-judge panel's Procedural Due Process analysis of invalid notice.

Majority Opinion Analysis.

The majority essentially applied a rational basis standard of constitutional analysis, rather than strict scrutiny. The test to determine the level of scrutiny, the court stated, was whether the law is reasonable and nondiscriminatory. *Bates* p. 8 of Thompson (majority) opinion. The majority held that there was no discrimination on voters' right to vote for candidates of their

choice, nor was there discrimination on an incumbent's ability to run for office, since such incumbents may run for other state offices after term limits force them out of incumbent office. *Bates*, pp. 8-9 of Thompson (majority) opinion.

The majority placed emphasis on whether there was discrimination as the test of whether term limits violate First and Fourteenth Amendment rights. The majority specifically held that, "more important, lifetime term limits do not constitute a discriminatory restriction". *Bates*, p. 9 of Thompson (majority) opinion. Lifetime term limits, according to the majority, does not make a content-based distinction on the freedom of expression or association, nor does it discriminate on the basis of race, religion or gender.

The majority held that the State had a legitimate interest in preventing "unfair incumbent advantages." *Bates*, p.9 of Thompson (majority) opinion. The voters, therefore, had the right to make the choice of approving lifetime term limits as a way to "promote democracy" and prevent such unfair advantages. *Bates*, p.10 of Thompson (majority) opinion.

The majority rejected the three-judge panel's Procedural Due Process analysis of invalid notice, holding that the voters were aware that Proposition 140 imposed term limits for life. The majority also implied that the panel's notice analysis itself may be faulty. The majority appeared concerned whether a federal court can determine if a state has given adequate notice to its voters regarding a statewide initiative ballot measure.

The majority also discussed procedural issues on res judicata (claim preclusion). Unlike the concurring opinions discussed below, the majority opinion did not address a federal question, and held that there was no res judicata.

CONCURRING OPINIONS. Many of the issues discussed in the concurring opinions were procedural, including doubts as to whether there existed a federal question allowing the federal court jurisdiction to hear the case and res judicata (claim preclusion) due to the *Legislature v. Eu* decision.

The following are more substantive issues raised in concurring opinions:

Concurring Opinion by O'Scannlain.

Ballot Access. Ballot access cases involving access by small political parties and independent candidates were distinguished from term limits on the basis that term limits affects politicians regardless of party affiliation. Such analysis implies that ballot access issues are narrowly based on whether the candidate is denied access on the basis of small party affiliation, and not on other circumstances, such as the candidate's level of experience.

Judge O'Scannlain's ballot access analysis could be challenged on the basis that the same purpose for which he relies on promoting access to the ballot for independent and small political party candidates applies to experienced candidates as well. In his opinion, Judge O'Scannlain states that independent and small political party candidates bring "unique ideas and viewpoints from the political marketplace" which would be excluded if such candidates were denied access

Procedural Due Process - Notice. Judge Fletcher asserts that whether the voters were adequately informed is an issue under the Court's purview, especially since the State made conflicting arguments in the two cases. The State had argued in *Legislature v. Eu*, that Proposition 140 imposed consecutive, not lifetime term limits, and now State is arguing that Proposition 140 clearly expressed to the voters the intent that the term limits provision was for life. *Bates*, Fletcher (dissenting) opinion, pp. 14-15.

Judge Fletcher implies that when fundamental constitutional rights are to be decided by the initiative process, the State must provide adequate notice by clarifying what the meaning of the proposed law is. *Bates*, Fletcher (dissenting) opinion, pp. 18-19.

Substantive Constitutional Issues. Judge Fletcher would use a standard derived from *United States Term Limits v. Thornton*, 514 U.S. 779 (1995) in analyzing the constitutionality of lifetime state legislative term limits. In *Thornton*, the U.S. Supreme Court held lifetime Congressional term limits to be unconstitutional based upon the qualifications clauses of Article II, Section I of the U.S. Constitution, which establishes the qualifications for Congressional office. Judge Fletcher interprets *Thornton* as relevant when examining the qualification established on state legislative office by prohibiting experienced candidates from access to the ballot.

Judge Fletcher states that the majority is incorrect in its conclusion that lifetime legislative term limits result in only reasonable, nondiscriminatory restrictions. Lifetime legislative term limits would disadvantage a particular class of candidates, and therefore "lifetime term limits cannot enjoy the deferential review that the ballot-access cases reserve to those procedural reforms that 'impose only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters.'" *Bates*, Fletcher (dissenting) opinion, p.26, quoting *Burdick*, 504 U.S. at 434. *Thornton* is the basis of Judge Fletcher's conclusion, because in *Thornton*, the U.S. Supreme Court establishes a test or "compromise" with regard to term limits, which allows states to regulate the electoral process to the extent that such restrictions limit the "candidate's level of engagement and support in that process itself." *Bates*, Fletcher (dissenting) opinion, p. 31.

Judge Fletcher also recognizes the State's interest "in experimenting with new forms of republican government under our federal system", however, "the States do not have a completely free hand in choosing how to organize themselves". *Bates*, Fletcher (dissenting) opinion, p. 32, 33-34.

Judge Fletcher was openly critical of the majority's lack of detail analysis about the term limits issue.

CONCLUSION. Although the majority upheld lifetime legislative term limits by a nine to two margin, the number of concurring and dissenting opinions written in the *Bates* case suggests that the full Ninth Circuit was divided in its analysis of the term limits issue. The majority wrote a surprising brief opinion which applied a regular standard of scrutiny to the term limits issue, and held that term limits was not a discriminatory restriction. The concurring opinions focused on other aspects of analysis. Judge O'Scannlain applied the ballot access test

based denial of access due to party affiliation, and rejected the proposition that denial of access due to legislative experience constitutes a recognizable ballot access issue. Judge Rymer held that the State had a right to control its own form of representational government, and that enacting lifetime legislative term limits was in the purview of that control. Judge Fletcher's dissenting opinion cited and greatly relied upon *U.S. Term Limits v. Thornton* in support of its state legislative term limits analysis, probably because *Thornton* is the only substantive legislative term limits case heard by the U.S. Supreme Court so far. The *Thornton* case, however, while it may be helpful to examine from the perspective of term limits issues, probably is not a controlling case in *Bates* analysis, because *Thornton* relied on Article II, Section 1 of the U.S. Constitution, which applies to qualifications for federal office, and not on the First and Fourteenth Amendments at issue in *Bates*.

Additionally, the tone of several opinions indicates that the Court may have been sensitive to public reaction to the three-judge panel Appellate Court decision on term limits. The panel court had rejected term limits on the basis that voters were not adequately informed that term limits were for life. In the days following the panel Appeals Court decision, editorials and newspaper articles were very critical of the court's line of analysis. *San Francisco Chronicle*: "Two Sophists Hide Behind Their Robes", by Debra J. Saunders, p. A21, October 14, 1997; and *Los Angeles Times*, from *Capitol Journal, Sacramento*: "Calling One Side Ignorant Won't End the Argument", by George Skelton, October 13, 1997.

BATES ANALYSIS-THREE-JUDGE PANEL-APPELLATE COURT. (Ninth Circuit Court of Appeals) three-judge panel decision rendered October 7, 1997.

The court's holding struck down by the full Ninth Circuit would have had some puzzling potential repercussions in terms of precedential value. By holding that the voters in California made an invalid waiver of their fundamental, constitutional rights under a due process analysis, the court seems to be suggesting that citizens can circumvent the rights preserved for all citizens under the U.S. Constitution by holding a state election and passing such a provision. Waiver of fundamental constitutional rights can be made by an individual concerning his or her own rights, but generally, such a waiver probably should not be made for everybody by a majority of people who chose to go out and vote. When the fundamental constitutional rights of all voters in a state are at stake, neither a majority nor even a super-majority of voters should be able to "waive" those rights for the minority, especially when there are other, less burdensome ways to address the issue of concern. It should be noted that the court concluded by stating that it was not deciding the fundamental issue of whether the State has the right to adopt lifetime legislative term limits, so it is unclear to what extent the court would have weighed the burden on constitutional rights against the State's interests as a substantive matter.

The court also appears to be making a distinction on what process should be used to achieve such a waiver. The court acknowledges that due to the nature of the initiative petition process, measures submitted to the voters by the initiative do not receive the same kind of debate, deliberation and consideration as measures which go through the legislature. *Bates*, 127 F.3d at 859-860. The court might be implying that the initiative petition process, as it currently exists without a formal method to consider the potential impact of laws proposed through the initiative is the wrong process when the proposed law would impose a severe constitutional

burden. The court then, however, states that adequate notice would have been achieved if the voters were simply told that the limits were for a lifetime. *Id.* at 862. Due to the nature of the court's analysis, therefore, it is difficult to determine how the decision could have impacted future term limits cases.

BATES ANALYSIS--DISTRICT COURT. The District Court's analysis in *Bates* is very helpful to examine, since it addresses the substantive constitutional issues inherent in lifetime state legislative term limits.

Constitutional Implications. The Court mainly looked at two elements when examining the constitutionality of lifetime term limits: ballot access and qualifications for office. The court analyzed the burden of term limits on First and Fourteenth Amendment rights, and the State's interest and justification for the burden. The rights involved were voting and associational rights, the right to vote for a particular candidate, freedom of expression and the right to run for office.

The State's Case. The State's case for term limits was made in terms of state sovereignty and the State's interest in addressing problems in the political process, including political careerism, advantages of incumbency, electoral competition, encouraging qualified candidates, increasing the representativeness of the legislature and rotation of office holders.

Holding. The Court held that lifetime legislative term limits were not narrowly tailored to achieve the State's substantial interest in furthering political accountability. The Court held that there was a severe burden on First and Fourteenth Amendment rights of voting, expression and association.

The criterion used by the Court requires that the State have a precise interest with justification for the burden, and that Court consider the extent to which those interests are necessary for the burden. Of the interests argued by the State, the Court acknowledged that the State had a legitimate interest in defining its own political institutions and reducing unfair electoral advantages by incumbents. The other interests, while important to the State, should be addressed in ways which do not impair voters' and candidates' constitutional rights.

The Court suggests alternative ways to deal with such problems through legislative redistricting by a non-partisan body, campaign finance and ethics reform, and by true rotation of office by limiting consecutive terms (rather than a lifetime ban on holding office).

CONCLUSION. *Bates* represents the first solid challenge to lifetime State legislative term limits in federal court. As might be expected from a case of first impression, the Appellate and District Courts each approached the *Bates* case differently. The District Court was more substantive in its analysis, while the panel appellate court found a procedural reason to invalidate lifetime legislative term limits in California. The full Ninth Circuit upheld term limits, but with differing opinions as to why, however, the case is expected to go to the U.S. Supreme Court. In the meantime, the decisions handed down so far provide insight as to the ultimate decision about lifetime legislative term limits. Courts hearing the *Bates* case, at every level examined so far, have indicated differing opinions about lifetime legislative term limits.

OREGON. *Markham v. Keisling*, No. 97-6237-TC (U.S. Dist. Ct. Oregon, Dec. 16, 1997). In a case similar to *Bates*, the U.S. District Court for the District of Oregon (also in the Ninth Circuit) recently struck down Oregon's term limits law, but delayed enforcement of the injunction until after appeal. The *Markham* case relied on reasoning in the *Bates* District Court and three-judge panel Appellate Court **prior to the most recent *Bates* decision by the full Ninth Circuit Court of Appeals.** It is likely, therefore, that the *Markham* decision will be reversed on appeal.

Oregon's term limits provisions are essentially identical to California, with six-year limits on Representatives and eight-year limits on Senators.

Analysis. The Court applied a two part test. First, the issue was whether lifetime state legislative term limits "severely burden voters' First and Fourteenth Amendment rights". The second part was whether the term limits were "narrowly tailored to advance a compelling state interest". *Markham*, p. 4.

Relying on the *Bates* cases **prior to the full Ninth Circuit decision**, the Court held that lifetime term limits satisfied the first part of the test; that is, lifetime term limits severely burdens voters' constitutional rights. The majority in the *Bates* full Ninth Circuit decision held the opposite.

For the second part of the test, the Court examined the State's interests and held that those interests were not narrowly tailored to achieve a compelling interest. The State's interests were the promotion of varied representation, expanding opportunities for public service and shrinking incumbency powers. The Court held that these interests were not narrowly tailored because the State could have achieved its goals with a less severe burden. In fact, the court held that the burden on voters is so severe that the provision must be "narrowly drawn to advance only the compelling interests [the state] purports to advance. It is not." *Markham*, p. 9. The Court held that "consecutive term limits can address any legitimate concerns with the advantages of incumbency while providing less of a burden on important fundamental rights." *Markham*, p. 10.

Since *Markham* relies on *Bates* decisions which have been reversed by the full Ninth Circuit, the *Markham* decision is expected to be reversed on appeal.

TERM LIMITS IN MISSOURI

When examining the constitutionality of lifetime state legislative term limits in Missouri, first a comparison of California and Missouri will be made, since both states have similar term limits laws. Additionally, since one of the primary goals of term limits is to increase turnover, turnover rates for Missouri Senate and House members will be examined to determine whether increased turnover is necessary in Missouri. Campaign costs, an area which is impacted by higher turnover resulting in more contested elections, also will be studied. Finally, an analysis of the constitutionality of Missouri's term limits law based on the *Bates* decisions will be made.

COMPARISON OF CALIFORNIA AND MISSOURI. In assessing the relevance of the *Bates* decision in Missouri, it is helpful to examine aspects pertinent to term limits in both states.

LIFETIME BAN

California: Senators limited to 2 4-year terms (8 years)
Representatives limited to 3 2-year terms
(6 years)

Missouri: Senators limited to 8 years
Representatives limited to 8 years
No more than 16 years total

LIFETIME BAN ON OTHER ELECTED OFFICIALS. In California, the following elected state officials are limited to two four-year terms: Governor, Lt. Governor, Attorney General, Controller, Secretary of State and Treasurer. Missouri has identical term limits for Governor and Treasurer only.

VOTERS APPROVED TERM LIMITS in both states, however, California's adoption of term limits was by a much more narrow margin than Missouri. California's term limits were passed by a 52% to 48% margin, and term limits failed in 30 of California's 80 Assembly districts. Term limits in Missouri passed by a margin of 75% to 25% and passed in every county.

NATURE OF THE LEGISLATURES. California has a full-time legislature which convenes throughout the year (solid two-year period, December 2, 1996, through November 30, 1998). Missouri, on the other hand, is a part-time, citizen legislature which convenes from early January through mid-May (four and one-half months).

The State's primary interest, as stated in the *Bates* district court decision, is to encourage a more representative form of government; one that reflects the citizens of the State. Missouri already has a citizen legislature, with most of its members engaged in employment and community activities outside the realms of the legislature. *The Sometimes Government; A Critical Study of the 50 American Legislatures* by the Citizens Conference on State Legislatures, in 1973 ranked Missouri number five out of the 50 states in terms of the representativeness of the legislature. Missouri probably is even more representational now. The Missouri Senate itself has members whose occupations include publishing, medicine, education, farming, law and various business professions. The Missouri House is probably even more representative of Missouri citizens in terms of occupation, which was viewed as an important factor by *The Sometimes Government* authors.

MISSOURI DATA. Of the seven states which have passed lifetime term limits,

Missouri's provision passed with the highest percentage of votes:

State	Year Adopted	% Votes in Favor
California	1990	52.2
Oklahoma	1992	57.3
Michigan	1992	58.8
Arkansas	1992	59.9
Oregon	1992	69.6
Nevada	1994	70.4
Missouri	1992	75.0

Source: NCSL - "National Conference of State Legislatures"
<http://www.ncsl.org/programs/legman/about/termlim.htm>.

In fact, including all 20 states which have passed state legislative term limits of any kind by voter approval, even without lifetime limits, Missouri's term limits provision passed with the fourth highest percentage of votes, with Wyoming receiving 77.2% votes in favor of term limits, Florida receiving 76.8% votes in favor and Louisiana receiving 76% votes in favor. Utah completes the 21 states with some form of State legislative term limits, however Utah's legislature passed its term limits. *Ibid*

In Missouri, however, over \$280,000 was spent in support of term limits, while only about \$11,000 was spent in opposition. *1992 Missouri Annual Campaign Finance Report*. Money spent in support of term limits exceeded money spent in opposition by more than 25 to 1.

Missouri Legislature—turnover. Missouri's legislators are limited to eight years in each house under term limits, however, the actual average turnover before the application of term limits is not much more than eight years.

On average, looking at the time period from 1974-1997, Missouri legislators in the House of Representatives served nine years, which is equivalent to four and one-half terms. *See Chart D*. During the period 1974-1997, approximately 33% of Incumbent Missouri Representatives have been defeated at election. *Compiled from Official Manual, State of Missouri, 1973-1996*.

In the Missouri Senate, the average number of years served in the period from 1974-1997 is eleven years, which would be just short of three terms. *See Chart C*. The fact that Senators tend to serve for a longer period is most likely due to the fact that they serve longer terms to begin with (four-year-terms for Senate, two-year-terms for House), they usually have more legislative experience (43% have served in both Houses), and they serve in a more deliberative body, which by its nature tends to have more stability. During the period 1974-1997, approximately 20% of incumbent Missouri Senators have been defeated at election. *Compiled from Official Manual, State of Missouri, 1973-1996*.

The fact that the average years of service in the Senate is eleven years fails to reflect the level of experience of current members of the Senate. While less than 10% of House members have more than ten years total legislative experience, over 30% percent of the current senators

have more than twenty years total legislative experience. *See Exhibits B-D.* This probably reflects the fact that 43% of the current Senators have previously served in the House. The fact that some legislators serve longer terms may reflect voter satisfaction with those legislators who may be recognized and valued for legislative experience.

Campaigning - Missouri. Contested elections tend to cost more than non-contested elections. Some term limits supporters believe that long-standing incumbents generally are not challenged as often for their seats, and that, therefore, term limits would increase the number of people running for office. If there are more contested elections, however, campaign costs would tend to increase.

On average a candidate in the 1994 primary election for Missouri Representative received just under \$10,000 and made expenditures just under \$5,000. Candidates in the 1994 general election received on average just under \$14,000 and spent just under \$9,000. *Compiled from 1994 Missouri Annual Campaign Finance Report.*

Candidates in the 1994 primary election for Senate received on average just under \$46,000 and made expenditures of about \$32,700. In the 1994 general election for Senate, candidates received on average about \$72,500 and spent about \$62,000. *Compiled from 1994 Missouri Annual Campaign Finance Report.*

California has term limits for almost all statewide elected offices. Missouri has term limits for only Governor and Treasurer, and since the ratio of Representatives to Senators is five to one, there are not enough senatorial seats to fill all sitting representatives who potentially could run for that office after term limits begin implementation. This could result in more expensive campaigning since contested elections cost more, which may raise the issue of campaign finance reform.

POSSIBLE ANALYSIS FOR MISSOURI BASED ON BATES NINTH CIRCUIT DECISION. In the *Bates* Ninth Circuit decision, the majority briefly analyzed the constitutional aspects of lifetime legislative term limits. Under the majority opinion's analysis there is no severe burden, but rather a minimal burden upon voters' right to select an experienced candidate and upon the candidate's access to the ballot. Such reasoning in Missouri would result in a holding for the constitutionality of term limits.

The concurring opinions' analysis also would result in a holding for the constitutionality of term limits in Missouri. Based on Judge O'Scannlain's analysis on ballot access, a narrow standard applies. Fundamental access rights are limited only with respect to independent candidates and small political party candidates, and not to candidates or parties which have established themselves in the political election process.

Based on Judge Rymer's analysis of states' rights, one would conclude that the Missouri voters have the right to shape their form of representational government, pursuant to Article IV, Section 4 of the U.S. Constitution.

Based on the dissenting opinion by Judge Fletcher, Missouri's legislative term limits would be struck down on its face due to analysis already proposed in *U.S. Term Limits v. Thornton*, and there could be notice problems involving Procedural Due Process, similar to that discussed below in the subtopic "Possible Analysis for Missouri Based on the Panel Appellate Decision".

POSSIBLE ANALYSIS FOR MISSOURI BASED ON BATES PANEL APPELLATE DECISION. If the analysis in the **three-judge Appellate Court** decision were applied in Missouri, the term limits petition could be considered to meet the procedural due process standard as set forth in the *Bates* appellate decision, however, this should not be taken to mean that lifetime legislative term limits would necessarily be upheld in Missouri.

The Panel Appellate Court held that there was an invalid waiver of procedural due process on the nature of the petition. Specifically, the Panel Appellate Court found that voters were not adequately informed that the term limits provision would be a lifetime limit, since nowhere in the information readily available to the public did it say "lifetime" or "total" or "permanent". In Missouri, the term limits provision on the ballot says "no more than sixteen years **total**". The next question, then, is whether the word "total" as approved by the voters in a Constitutional Amendment clearly establishes a lifetime limit, which arguably it does not. None of the petition information, including the ballot summary, clearly stated that the limit was for life. *Constitutional Amendment No. 12, Official Ballot State of Missouri - Special Election, Nov. 3, 1992. See Exhibits E and F.*

Additionally, the *Bates Panel Appellate Court* relied on the fact that the vote was close: 52% - 48%, in support of its conclusion that the voters had inadequate notice, and had the voters been better informed, the vote could easily have gone the other way. Term limits passed in Missouri by a vote of 75% to 25%, and passed in every county. *See, Official Manual, State of Missouri, 1993-1994, pp. 538, 543-546.* Such a strong Missouri vote for term limits, two years after the California provision passed, would appear to indicate that Missouri voters overwhelmingly supported term limits.

Whether the Missouri voters knew that they were adopting lifetime term limits is another matter; however, the case is weaker under the *Bates* three-judge Appellate Court test since the Missouri ballot language used the words "total".

POSSIBLE ANALYSIS FOR MISSOURI BASED ON BATES DISTRICT COURT DECISION. In the *Bates District Court* decision, the Court reasoned that a majority of voters cannot override something if it is unconstitutional. The Court, however, specifically cited as significant the fact that this 48% minority of voters, including the majority of 30 Assembly districts, were prevented from voting for candidates with legislative experience, which is in itself a distinguishing political view. Because of Missouri's overwhelming approval of term limits, however, a court could arguably conclude from the *Bates* case that an extremely small minority may not constitute a distinguishing political view; thereby weakening the argument that a severe burden is being placed on those voters' constitutional rights.

CONCLUSION ON POSSIBLE ANALYSIS. Lifetime legislative term limits in Missouri, relying on analysis in the *Bates* federal district and appellate decisions, ultimately depends on the how a court would look at the severity of the burden on the voters' right to select an experienced candidate and the candidate's access to the ballot. If a court takes a very narrow approach to First and Fourteenth right to vote issues, term limits will be upheld, as was done by the *Bates* Ninth Circuit majority. If the court values all voters' rights to have distinguishing views in the electoral process, including the voter's right to select an experienced candidate, a court will strike down term limits, as was done in the *Bates* panel Appellate and District Court decisions, and in the *Markham* decision regarding Oregon's term limits law.

OPTIONS TO LIFETIME LEGISLATIVE TERM LIMITS

Ultimately, the constitutionality of lifetime state legislative term limits will be decided by the U.S. Supreme Court. Regardless of how the Supreme Court rules, the practical aspects of the legislative form of government necessarily require examination of methods and options in lieu of lifetime term limits. Consideration should always be given to legitimate concerns of the State, and constitutional rights of its citizens. Courts have demonstrated that if a fundamental right is at stake, the burdens placed upon those rights by the State should not be any more restrictive than necessary. Below are some options which may address legitimate concerns of the State, but may not be as great of a burden on constitutional rights.

Rotation of office (non-permanent term limits).

Place term limits on those in leadership positions in the legislature.

Changing the number and proportion of House and Senate districts.

Extending the number of years of lifetime term limits.

Campaign finance and ethics reform (this is really a separate issue which has been examined extensively in Missouri, and, therefore, will not be examined in this report).

Education of the public in the civic responsibility of voting which may decrease or eliminate the need for term limits.

ROTATION OF OFFICE (NON-PERMANENT TERM LIMITS) - Considered in SJR 12 (1995). One of the common arguments of term limits supporters is that incumbents stay in office too long because of the nature of incumbency--status, name-recognition, more sophisticated politically, etc. In *Bates*, the District Court made a distinction between a lifetime ban on term limits and term limits which do not place a lifetime ban on serving in an office, by suggesting that the latter may be constitutionally permissible.

The concept of term limits without a lifetime ban is applied in fourteen of the twenty-one states which currently have legislative term limits--a ratio of two to one against a lifetime ban. Many of these states limit the number of consecutive terms (Arizona, Colorado, Florida, Louisiana, Maine, Nebraska, Ohio, South Dakota and Utah--nine states). Other states limit the maximum number of years which may be served within a specific time frame (Idaho, Massachusetts, Montana, Washington and Wyoming--five states). Limiting the number of consecutive terms may be easier to track, however limiting the number of years within a given time frame would tend to promote flexibility for the legislator--especially those serving partial terms.

Another possibility would be to establish a petition process by which voters in the district could elect to keep the incumbent beyond the term limit time period if a certain percentage of signatures were obtained (e.g., 10%). This idea was considered in SJR 12 (1995).

Term limits without a lifetime ban was found by dicta, or without an official holding, to be acceptable, and possibly even laudable, to the District Court in *Bates*. This option would provide voters with the ability to re-elect legislators whom they support after a brief break from legislative service.

PLACE TERM LIMITS ON THOSE IN LEADERSHIP POSITIONS IN THE LEGISLATURE - Considered in SJR 20 (1998). Rather than place term limits on all legislators, limits could be placed only on how long those in particular positions of power, such as leadership and chairmanships may hold office. There could exist potential constitutional issues of association, though, since certain positions of leadership (e.g., floor leader, whip, caucus chair, etc.) are partisan in nature.

SJR 20 (1998) would place a four-year lifetime limit on service as Speaker of the House of Representatives and President Pro Tem of the Senate, and would repeal current legislative term limits.

CHANGING THE NUMBER AND PROPORTION OF HOUSE AND SENATE DISTRICTS - Considered in SJR 12 (1995). Changing the number of districts would have a sizeable impact on the nature of district boundaries and number of constituents and, therefore, on the potential makeup of the legislature. Currently, in Missouri there are approximately five representatives for every senator. On the average, there are approximately three representatives for every senator in state legislatures. *See Exhibit G.* By adjusting the ratio of representatives to senators so that it is proportional to the average nationwide, Missouri may be able to foster competition both in terms of the number of candidates seeking office, and in the relationship between both houses of the General Assembly. One of the primary complaints of term limits supporters is the lack of competition in legislative elections.

There are any number of ways to adjust the number of seats to a 3:1 ratio. For example:

1. Keep the current total number of Senate seats (102 Representatives, 34 Senators);
2. Adjust the total number of seats so that it equals the national average of 148 (111 Representatives, 37 Senators).

One may wish to consider the effect of changing these numbers on the balance between the two houses, the boundaries and population in each district, and the effects within each Chamber.

EXTENDING THE NUMBER OF YEARS OF LIFETIME TERM LIMITS. (Also considered in SJR 12 (1995)).

In SJR 12, consideration was given to extending the number of years served under term limits from eight to twelve years in each house and by changing the terms of office for senators and representatives to six and four years, respectively.

The biggest issue in this legislation was how to modify the terms of House and Senate members from two- and four-year terms to four- and six-year terms respectively. These terms were staggered according to even and odd district numbers, and some members would have shorter terms in this transition, which could have important political implications.

Additionally, it is unknown whether extending the number of years of the lifetime limit would resolve constitutional issues regarding voting, ballot access and associational rights concerning the selection of experienced candidates.

EDUCATION OF THE PUBLIC IN CIVIC RESPONSIBILITY - Concept considered in SB 199 (1997) and similar legislation in previous years). By educating the public in the civic responsibility of voting, the need for term limits in the law may be eliminated. The voters already can limit an incumbent's term by voting him out of office. Arguably, limiting an incumbent's term by the power of the voter already exists. The turnover rate for the Missouri House in the past eight years (1988-1996) is over 70% and for the Senate it is over 60%, which suggests that term limits are not needed to increase turnover in the Missouri General Assembly. *Compiled from Official Manual, State of Missouri, 1987-1996.* By retaining a minority of experienced legislators, moreover, institutional knowledge is preserved.

CONCLUSION

The constitutionality of lifetime state legislative term limits is new to the courts, and *Bates* represents the first challenge. Due to the broad impact of term limits in state legislatures across the nation, and the differences in opinion among Ninth Circuit Appellate and District Court justices, it is expected that the U.S. Supreme Court will ultimately hear this case. Missouri is one of only seven states in the nation which currently has lifetime State legislative term limits, although twenty-one states have some form of legislative term limits. The remaining fourteen states limit consecutive years of service, which is much less likely to be constitutionally suspect.

The *Bates* case presents Missouri with a serious challenge of how to address constitutional problems with our current term limits law. The Ninth Circuit federal courts, both at the district and appellate levels, have differences of opinion in the application and analysis of the constitutionality of lifetime state legislative term limits. The full Ninth Circuit upheld term limits although there was a difference in opinion as to why. The three-judge appellate court essentially stated that since California voters were not given adequate notice that term limits would last for a lifetime, they did not make a knowing waiver of their constitutional rights under Procedural Due Process. The District Court focused on substantive constitutional issues, including ballot access, limitations on qualifications of candidates, and other issues relating to the right to vote. The District Court held that while the State had a legitimate interest in reducing unfair electoral advantages by incumbents and in defining its own political institutions, the burden of lifetime legislative term limits was greater than necessary, since other, less burdensome options, such as non-lifetime term limits were available.

Due to the similarities between California, Missouri and the five other states with lifetime state legislative term limits, it is likely that any U.S. Supreme Court decision in *Bates* could have a significant impact on term limits in Missouri, and in the other states with lifetime term limits.

Missouri has other options which may be considered in lieu of lifetime legislative term limits. Options can be explored regardless of what the U.S. Supreme Court ultimately decides about the constitutionality of term limits. Such options include implementation of consecutive non-lifetime legislative term limitations, adjusting the size and number of representative districts so they are on a more balanced level in terms of other State legislatures and educating the public on voting and other civic responsibilities.

TABLE OF AUTHORITIES

<i>Bates v. Jones</i> , No. 97-15864, U.S. App, 9th Cir., Dec. 19, 1997	p. 1, 4, 5
<i>Jones v. Bates</i> , 127 F.3d 839 (Ct. App., 9th Cir., Oct. 7, 1997)	pp. 1, 3, 4, 5, 6, 7, 9, 10, 12
<i>Bates v. Jones</i> , Case No. C 95-02638 CW (U.S. Dist. Ct., N.D., Calif. Apr. 23, 1997)	pp. 1, 3, 4, 5, 6, 7, 9, 10, 12
<i>Anderson v. Celebrezze</i> , 103 S.Ct. 1564, 460 U.S. 780 (1983)	p. 2
<i>Burdick v. Takushi</i> , 112 S.Ct. 2059, 504 U.S. 428 (1992)	p. 2
<i>Tashjian v. Republican Party of Connecticut</i> , 107 S.Ct. 544, 479 U.S. 208 (1986)	p. 3
<i>Legislature v. Eu</i> , 54 Cal. 3d 492 (1991)	p. 3, 7
<i>United States Term Limits v. Thornton</i> , 514 U.S. 779 (1995)	pp. 6, 7, 14
<i>San Francisco Chronicle: "Two Sophists Hide Behind Their Robes"</i> , by Debra J. Saunders, p. A21, October 14, 1997	p. 8
<i>Los Angeles Times, from Capitol Journal, Sacramento: "Calling One Side Ignorant Won't End the Argument"</i> , by George Skelton, October 13, 1997	p. 8
<i>Markham v. Keisling</i> , No. 97-6237-TC (U.S. Dist. Ct. Oregon, Dec. 16, 1997)	p. 10
<i>The Sometimes Government; A Critical Study of the 50 American Legislatures</i> by the Citizens Conference on State Legislatures	p. 11
NCSL - "National Conference of State Legislatures" http://www.ncsl.org/programs/legman/about/termlim.htm	p. 12
1992 Missouri Annual Campaign Finance Report	p. 12
Official Manual, State of Missouri, 1973-1996	p. 12
1994 Missouri Annual Campaign Finance Report	p. 13
Official Manual, State of Missouri, 1993-1994	p. 14
Official Manual, State of Missouri, 1987-1996	p. 17

STATES WITH TERM LIMITS**STATES WITH LIFETIME LIMITS**

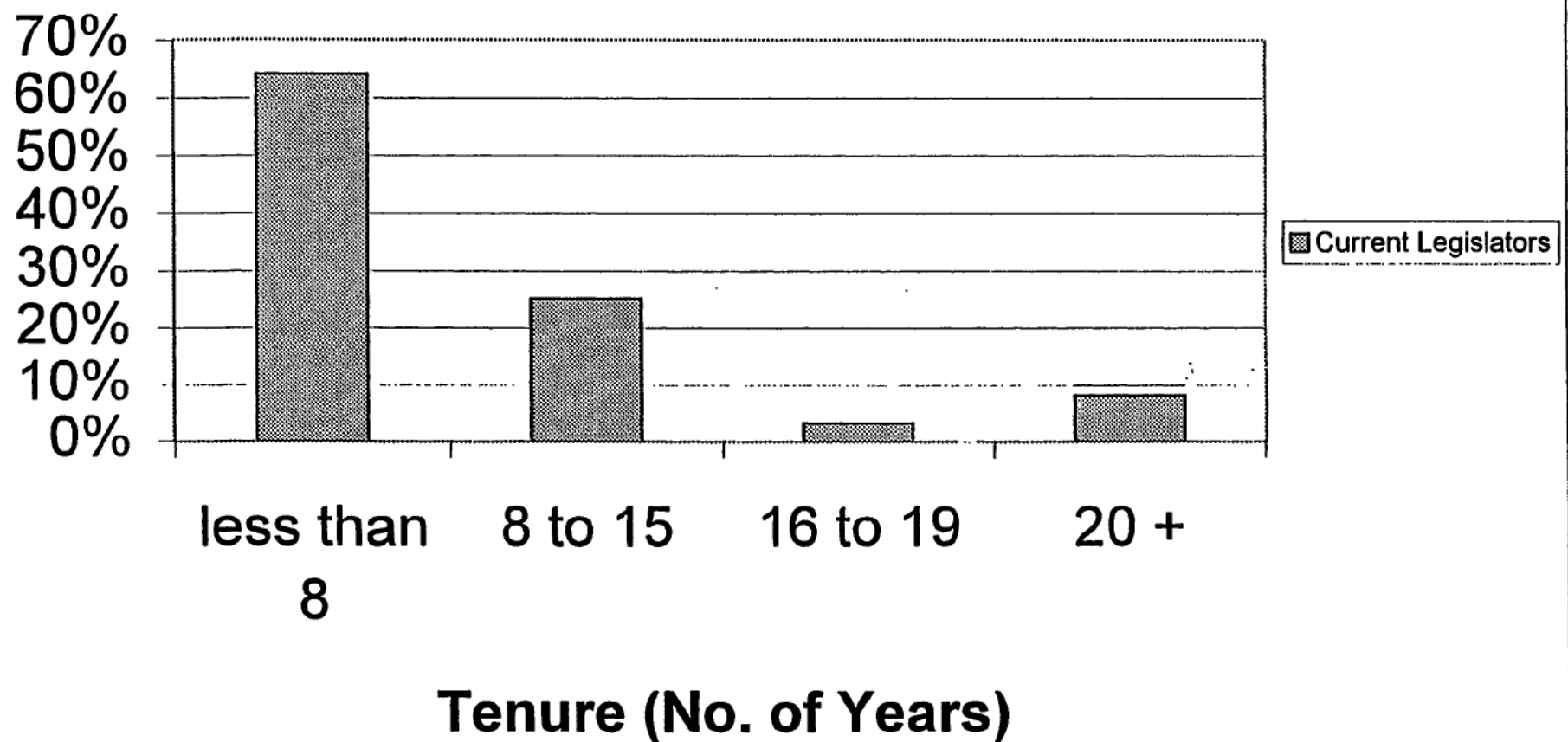
<u>STATE</u>	<u>HOUSE OF REPRESENTATIVES</u>	<u>SENATE</u>	<u>SOURCE</u>
Arkansas	3 terms in the House	2 terms in the Senate	Const. Amend. 73, Sec. 2
California	3 terms in the House	2 terms in the Senate	Const. Art. V, Sec. 2
Michigan	3 terms in the House	2 terms in the Senate	Const. Art. IV, Sec. 54
Missouri	8 years in one house	16 years in both houses	Const. Art III, Sec. 8
Nevada	12 years in the House	12 years in the Senate	Const. Art. IV, Sec. 3-4
Oklahoma	12 years in both houses		Const. Art. V, Sec. 17a
Oregon	6 years in the House	8 years in the Senate	Const. Art. II, Sec. 19

STATES WITH SOME OTHER FORM OF TERM LIMITS

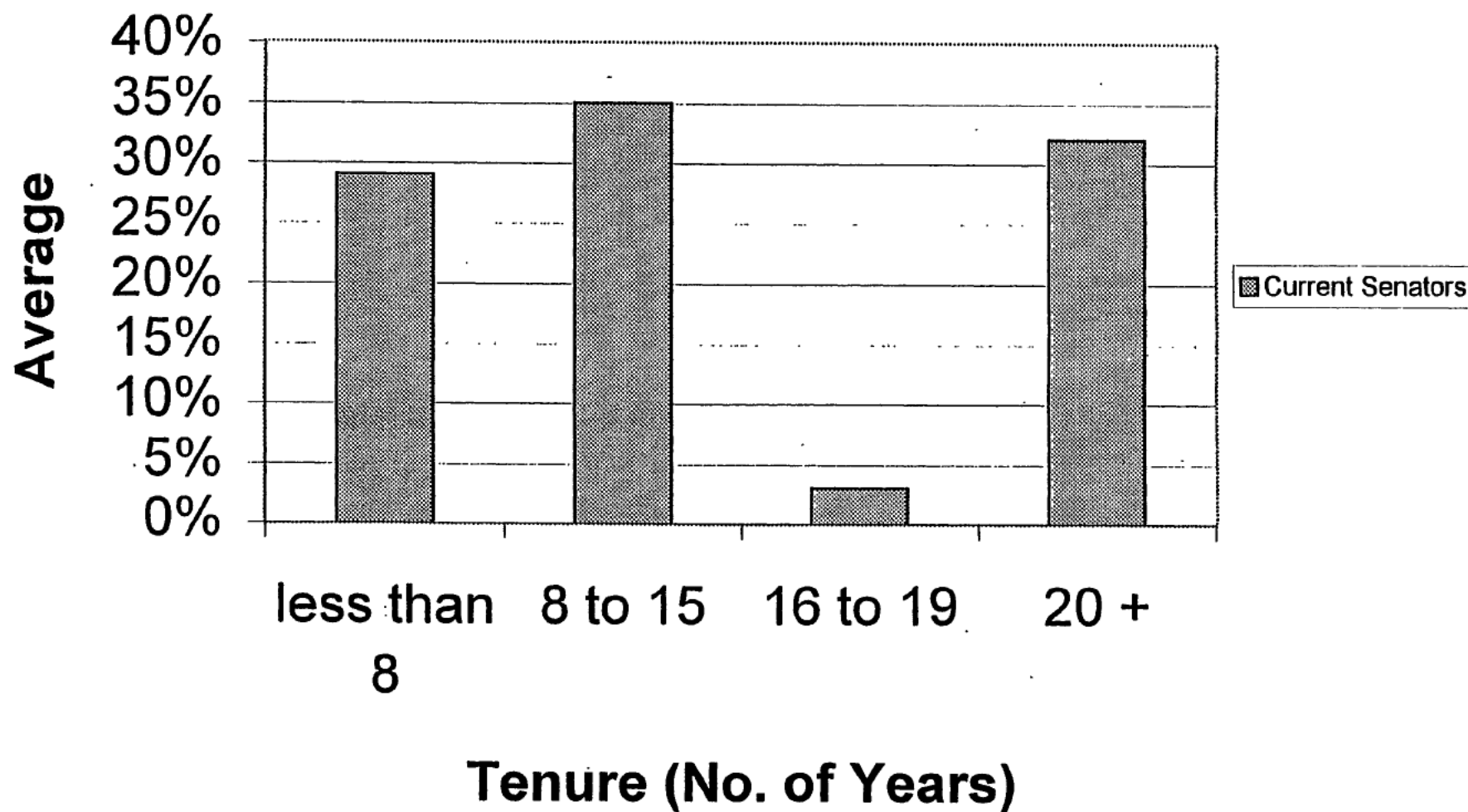
<u>STATE</u>	<u>HOUSE OF REPRESENTATIVES</u>	<u>SENATE</u>	<u>SOURCE</u>
Arizona	4 consecutive terms in the legislature		Const. Art. IV, part 2, Sec.21
Colorado	4 consecutive terms in the House	2 consecutive terms in the Senate	Const. V. Sec. 3
Florida	8 consecutive years in the Legislature		Const. Art. VI, Sec. 4
Idaho	8 years service within previous 15 years		Code Sec. 34-907
Louisiana	3 consecutive terms in the Legislature		Const. Art. III, Sec. 4
Maine	4 consecutive terms in the Legislature		Statutory 21-A, Sec. 553
*Massachusetts	4 terms in preceding 9 years in the Legislature		Statutory 53, Sec. 48
Montana	8 years within the preceding 16 years		Const. Art. IV, Sec. 8
*Nebraska	2 consecutive terms in the Legislature		Const. Art. III, Sec. 8
Ohio	4 consecutive terms in the House	2 consecutive terms in the Senate	Const. Art. II, Sec. 2
South Dakota	4 consecutive terms in the Legislature		Const. Art. III, Sec. 6
Utah	12 consecutive years in the Legislature		Code Sec. 20A-10-201
Washington	6 of previous 12 years in the House	8 of previous 14 years in the Senate	Code Sec. 44.04.015
Wyoming	12 of previous 24 years in the Legislature		Statutory 22-5-103

*Provisions struck down for procedural reasons

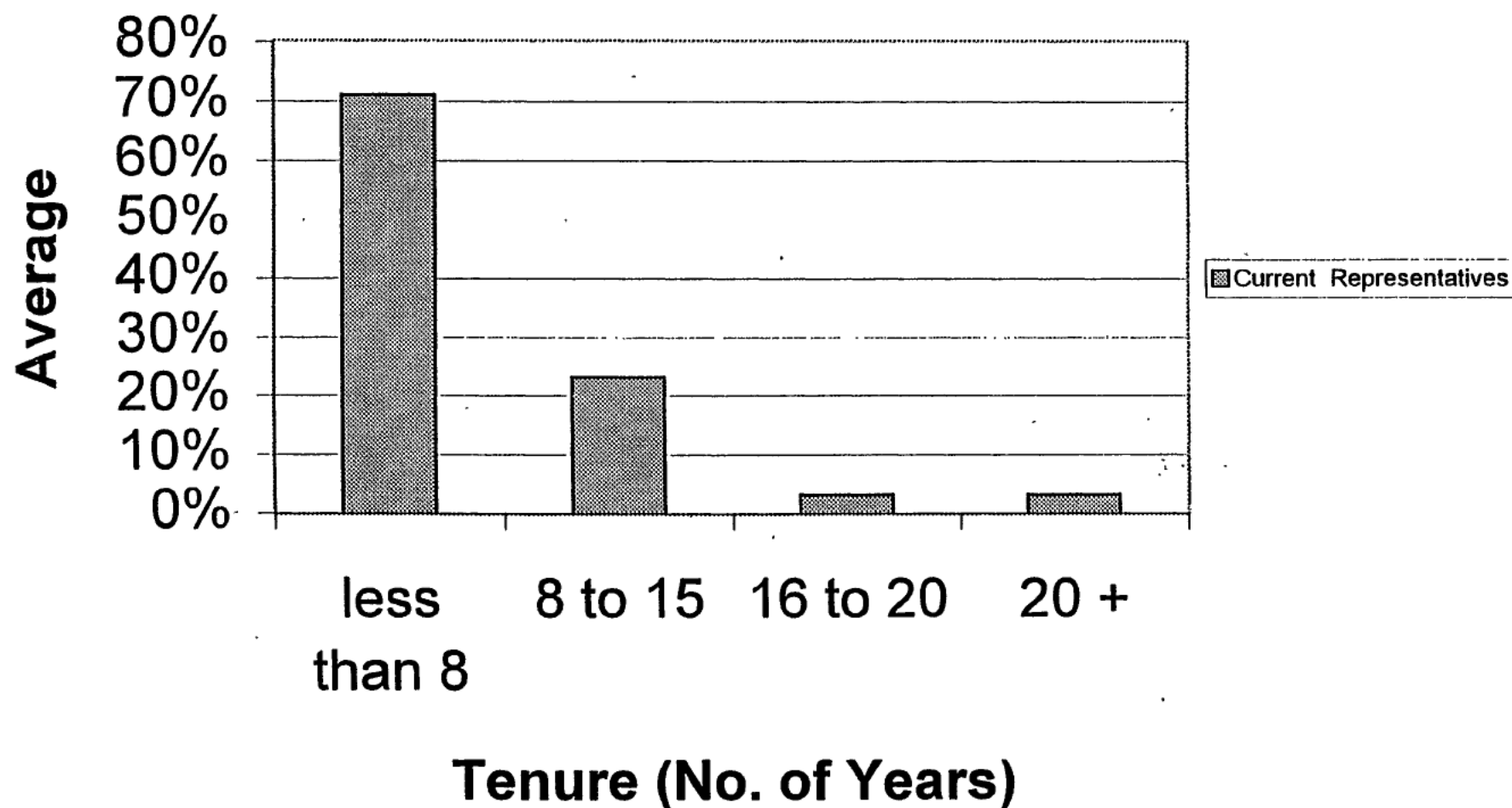
Total State Legislative Service of Current Senators & Representatives (1997)



Total Legislative Service of Current Senators (1997)



Total State Legislative Service of Current Representatives (1997)



CONSTITUTIONAL AMENDMENTS

CONSTITUTIONAL
AMENDMENT NO. 1*Proposed by the 86th General
Assembly (First Regular Session)*

Amends the percentage of qualified voters necessary to approve certain tax increases from two-thirds to four-sevenths in municipalities, counties, and school districts if question is submitted at a general municipal, primary, or general election. The proposal would have no direct cost. Indirect costs would depend upon voter approval in the various political subdivisions.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

CONSTITUTIONAL
AMENDMENT NO. 2*Proposed by the 86th General
Assembly (First Regular Session)*

Allows construction of toll roads and bridges. Toll authorities may issue bonds for design and construction of toll roads. Such bonds shall not constitute a debt or liability to the state. There may be minimal initial costs; any income or other effects will depend upon enabling legislation and subsequent actions of toll road authorities.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

CONSTITUTIONAL
AMENDMENT NO. 3*Proposed by the 86th General
Assembly (First Regular Session)*

Simulcasting of horse races allowed by a licensed live horse track operation, will permit off-track wagering if such licensee conducts live horse races at licensee's horse track for a specified minimum number of days. There would be no direct cost to the state or any political subdivision. There would be increased inducements for investors to build and operate race tracks in Missouri.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

CONSTITUTIONAL
AMENDMENT NO. 4*Proposed by the 86th General
Assembly (First Regular Session)*

Crime victims to have right to be informed of and be present at criminal proceedings, right to restitution, right to protection from defendant, and right to be informed of escape or release of defendant. Cost of this proposal would depend upon enabling legislation and actions of judges.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

CONSTITUTIONAL
AMENDMENT NO. 6*Proposed by the 86th General
Assembly (First Regular Session)*

Budget Stabilization Fund created to meet certain funding requirements if revenues are not sufficient to meet appropriations, if authorized by four-sevenths of both houses of the legislature. The proposal would not affect total revenue collections; the impact on specific fund balances would depend upon legislative actions.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

CONSTITUTIONAL
AMENDMENT NO. 10*Proposed by the 86th General
Assembly (Second Regular Session)*

At all bond issue elections in St. Louis city, required majority for approval to be four-sevenths of votes cast. The proposal would reduce the majority needed to pass bond issues to four-sevenths in the city of St. Louis at all elections.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

CONSTITUTIONAL
AMENDMENT NO. 12*Proposed by Initiative Petition*

Shall Article III of the Constitution of Missouri be amended by adding a new section eight that would prohibit a person from serving more than eight years in either the state house of representatives or state senate, or a total of sixteen years in both houses, with any service resulting from an election or appointment occurring prior to the effective date of this amendment not counted toward the total number of years a person could serve? There could be indirect cost to state government; there would be no cost to local government.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

CONSTITUTIONAL
AMENDMENT NO. 13*Proposed by Initiative Petition*

Shall Article III of the Constitution of Missouri be amended by adding a new section 45 (n) that would prohibit Missouri's United States Senators from serving more than two terms and Missouri's United States Representatives from serving more than four terms and to apply to those terms of office which begin on or after this section becomes effective, with this section taking effect only after one-half of the states enact term limits for their members of congress; and further, should this section be found invalid the people of Missouri would intend their federal elected officials to voluntarily comply with its provisions? There should be no direct cost or administrative impact to state or local government.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

STATUTORY MEASURES

PROPOSITION A

*Referendum ordered by the 86th General
Assembly (First Regular Session)*

Authorizes riverboat gambling excursions on the Mississippi and Missouri Rivers, regulated by the State Tourism Commission. Excursions may originate where locally approved by the voters. Five hundred dollar maximum loss limit per person per excursion. The proposal is intended to produce increased General Revenue.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

PROPOSITION C

*Referendum ordered by the 86th General
Assembly (Second Regular Session)*

Assigns additional duties to Lieutenant Governor. Establishes office of advocacy and assistance for elderly. Lieutenant Governor to be member of Tourism, Economic Development, Fund Commissioners Bonds and advisor for Educational Programs. No additional compensation. Cost to the state to implement this act would be \$60,000 a year paid from General Revenue funds. No cost to local governments.

YES ☐

NO ☐

INSTRUCTIONS TO VOTERS

If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".

INSTRUCTIONS TO VOTERS
(Punch Card)

If you are in favor of the question, punch a hole opposite the word "YES".

If you are opposed to the question, punch a hole opposite the word "NO".

INSTRUCTIONS TO VOTERS
(Optical Scan)

If you are in favor of the question, darken the oval opposite the word "YES".

If you are opposed to the question, darken the oval opposite the word "NO".

IT IS A CLASS A MISDEMEANOR FOR ANYONE TO SIGN ANY INITIATIVE PETITION WITH ANY NAME OTHER THAN HIS OR HER OWN, OR KNOWINGLY TO SIGN HIS OR HER NAME MORE THAN ONCE FOR THE SAME MEASURE FOR THE SAME ELECTION, OR TO SIGN A PETITION WHEN HE OR SHE KNOWS HE OR SHE IS NOT A NOT A REGISTERED VOTER.

EXHIBIT "F"

INITIATIVE PETITION

TO THE HONORABLE ROY D. BLUNT, SECRETARY OF STATE FOR THE STATE OF MISSOURI:

We, the undersigned, registered voters of the State of Missouri and _____ County (or city of St. Louis), respectfully order that the following amendment to the constitution shall be submitted to the voters for the State of Missouri, for their approval or rejection, at the general election to be held on the 4th day of November, 1992, and each for himself or herself says: I have personally signed this petition. I am a registered voter of the State of Missouri and _____ County (or city of St. Louis); my registered voting address and the name of the city, town or village in which I live are correctly written after my name.

CIRCULATOR'S AFFIDAVIT. STATE OF MISSOURI, COUNTY OF _____
I, _____, a Missouri registered voter and a resident of the State of Missouri, being first duly sworn, say (print or type names of signers)

NAME (Signature)	DATE SIGNED	REGISTERED VOTING ADDRESS (Street)(City, Town or Village)	ZIP CODE	CONGR. DIST.	NAME (Printed or typed)
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					
11.					
12.					
13.					
14.					
15.					
16.					
17.					
18.					
19.					
20.					

FILED
JUN 10 9 11
Roy D. Blunt
Sec. of State

signed this page of the foregoing petition, and each of them signed his or her name thereto in my presence; I believe that each has stated his or her name, registered voting address and city, town or village correctly, and that each signer is a registered voter of the State of Missouri and _____ County.

Signature of Affiant _____ Address of Affiant _____

Subscribed and sworn to before me this _____ day of _____, 199__.

Notary Public

(Seal)

My commission expires _____

Signature of Notary _____

NOTICE: You are advised that the proposed constitutional amendment changes, repeals, or modifies by implication, or may be construed to change, repeal, or modify by implication, the following provisions of the Constitution of Missouri - Sections 4, 5 and 18 of Article III, and may be construed to supplement Sections 2, 7, 12, 13, and 15 of Article III.

THE PROPOSED AMENDMENT

Shall Article III of the Constitution of Missouri be amended by adding a new section eight which would provide that no one shall be elected or appointed to serve more than eight years total in any one house of the General Assembly nor more than sixteen years total in both houses of the General Assembly, which section would not be retroactive?

BE IT RESOLVED BY THE PEOPLE OF THE STATE OF MISSOURI That the Constitution be Amended: By adding the following new section 8 to Article III:

Section 8. No one shall be elected or appointed to serve more than eight years total in any one house of the General Assembly nor more than sixteen years total in both houses of the General Assembly. In applying this section, service in the General Assembly resulting from an election or appointment prior to the effective date of this section shall not be counted.

State Senate and House Members by State

Name of State	Number of Senators	Number of Representatives	Total Legislators	Ratio, Reps to Senators
Alabama	35	105	140	3
Alaska	20	40	60	2
Arizona	30	60	90	2
Arkansas	35	100	135	3
California	40	80	120	2
Colorado	35	65	100	2
Connecticut	36	151	187	4
Delaware	21	41	62	2
Florida	40	120	160	3
Georgia	56	180	236	3
Hawaii	25	51	76	2
Idaho	35	70	105	2
Illinois	59	118	177	2
Indiana	50	100	150	2
Iowa	50	100	150	2
Kansas	40	125	165	3
Kentucky	38	100	138	3
Louisiana	39	105	144	3
Maine	35	151	186	4
Maryland	47	141	188	3
Massachusetts	40	160	200	4
Michigan	38	110	148	3
Minnesota	67	134	201	2
Mississippi	52	122	174	2
Missouri	34	163	197	5
Montana	50	100	150	2
Nebraska	*	*	49	*
Nevada	21	42	63	2
New Hampshire	24	400	424	17
New Jersey	40	80	120	2
New Mexico	42	70	112	2
New York	61	150	211	2
North Carolina	50	120	170	2
North Dakota	49	98	147	2
Ohio	33	99	132	3
Oklahoma	48	101	149	2
Oregon	30	60	90	2
Pennsylvania	50	203	253	4
Rhode Island	50	100	150	2
South Carolina	46	124	170	3
South Dakota	35	70	105	2
Tennessee	33	99	132	3
Texas	31	150	181	5
Utah	29	75	104	3
Vermont	30	150	180	5
Virginia	40	100	140	3
Washington	49	98	147	2
West Virginia	34	100	134	3
Wisconsin	33	99	132	3
Wyoming	30	60	90	2
Averages	39	111	148	3

* Nebraska is Unicameral

Source: State Leadership Directory - Elective Officials 1997

Constitution of Missouri
Article III, Section 8

Term limitations for members of general assembly. — No one shall be elected or appointed to serve more than eight years total in any one house of the General Assembly nor more than sixteen years total in both houses of the General Assembly. In applying this section, service in the General Assembly resulting from an election or appointment prior to the effective date of this section shall not be counted.

(Adopted November 3, 1992)

expanded "in the wake of" any kind of accident.

For these reasons, we hold that the NRC need not consider PANE's contentions.¹⁴ NEPA does not require agencies to evaluate the effects of risk *qua* risk. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to dismiss the petition for review.

It is so ordered.

Justice BRENNAN, concurring.

I join the opinion of the Court. There can be no doubt that psychological injuries are cognizable under NEPA. See *ante*, at 1560. As the Court points out, however, the particular psychological injury alleged in these cases did not arise, for example, out of the direct sensory impact of a change in the physical environment, cf. *Chelsea Neighborhood Assns. v. United States Postal Service*, 516 F.2d 378, 388 (CA2 1975), but out of a perception of risk. *Ante*, at 1561-1562. In light of the history and policies underlying NEPA, I agree with the Court that this crucial distinction "lengthens the causal chain beyond the reach" of the statute. *Ibid*.



460 U.S. 780, 75 L.Ed.2d 547

John B. ANDERSON, et al., Petitioners,
v.

Anthony J. CELEBREZZE, Jr.,
Secretary of State of Ohio.

No. 81-1635.

Argued Dec. 6, 1982.

Decided April 19, 1983.

Independent candidate for office of
President of the United States and three

14. The Court of Appeals held that the NRC need not consider PANE's contentions of community damage unless it found that the contentions of psychological health damage warrant preparation of an EIS. Since we decide that the NRC

voters brought suit challenging constitutionality of Ohio's early filing deadline for independent candidates. The United States District Court for the Southern District of Ohio, Robert M. Duncan, J., 499 F.Supp. 121, granted petitioners' motion for summary judgment and ordered the Secretary of State of Ohio to place candidates' name on general election ballot, and Secretary appealed. The United States Court of Appeals for the Sixth Circuit, 664 F.2d 554, Cornelia G. Kennedy, Circuit Judge, reversed, and certiorari was granted. The Supreme Court, Justice Stevens, held that Ohio statute requiring independent candidate for office of President to file statement of candidacy and nominating petition in March in order to appear on general election ballot in November placed unconstitutional burden on voting and associational rights of supporters of independent candidate.

Reversed.

Justice Rehnquist dissented and filed opinion in which Justice White, Justice Powell, and Justice O'Connor joined.

1. Elections ⇐22

State has right to require candidates to make preliminary showing of substantial support in order to qualify for place on ballot.

2. Elections ⇐21

State has right to prevent distortion of electoral process by device of "party raiding," the organized switching of blocks of voters from one party to another in order to manipulate outcome of other party's primary election.

3. Constitutional Law ⇐82(8), 274.2(3)

In resolving constitutional challenges to specific provisions of state's election

need not consider the contentions of psychological health damage at all, it follows that the contentions of community damage need not be considered.

laws, court must first consider character and magnitude of asserted injury to rights protected by First and Fourteenth Amendments that plaintiff seeks to vindicate; it must then identify and evaluate precise interests put forth by state as justifications for imposing its rule; and, in passing judgment, court must not only determine legitimacy and strength of each of those interests, but also must consider extent to which those interests make it necessary to burden plaintiff's rights. U.S.C.A. Const. Amends. 1, 14.

4. Constitutional Law ¶82(8), 274.2(3)
Elections ¶22

In ballot access cases, inquiry is whether challenged restriction unfairly or unnecessarily burdens availability of political opportunity. U.S.C.A. Const. Amends. 1, 14.

5. United States ¶25

Section of Constitution delegating authority to states to regulate election of presidential electors does not give states power to impose burdens on right to vote, where such burdens are expressly prohibited in other constitutional provisions. U.S. C.A. Const. Art. 2, § 1, cl. 2.

6. Constitutional Law ¶82(8), 91
Elections ¶22

Ohio statute requiring independent candidate for office of President of United States to file statement of candidacy and nominating petition in March in order to appear on general election ballot in November placed unconstitutional burden on voting and associational rights of supporters of independent candidate. Ohio R.C. § 3513.257; U.S.C.A. Const. Amends. 1, 14.

Syllabus *

An Ohio statute requires an independent candidate for President to file a statement of candidacy and nominating petition in March in order to appear on the general election ballot in November. On April 24,

1980, petitioner Anderson announced that he was an independent candidate for President. Thereafter, on May 16, 1980, his supporters tendered a nominating petition and statement of candidacy, satisfying the substantive requirements for ballot eligibility, to respondent Ohio Secretary of State. Respondent refused to accept the documents because they had not been filed within the time required by the Ohio statute. Anderson and petitioner voters then filed an action in Federal District Court, challenging the constitutionality of the statute. The District Court granted summary judgment for petitioners and ordered respondent to place Anderson's name on the general election ballot, holding that the statutory deadline was unconstitutional under the First and Fourteenth Amendments. The Court of Appeals reversed, holding that the early deadline served the State's interest in voter education by giving voters a longer opportunity to see how Presidential candidates withstand the close scrutiny of a political campaign.

Held: Ohio's early filing deadline places an unconstitutional burden on the voting and associational rights of petitioner Anderson's supporters. Pp. 1568-1579.

(a) In resolving constitutional challenges to a State's election laws, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the interests asserted by the State to justify the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the court in a position to decide whether the challenged provision is unconstitutional. Pp. 1568-1570.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

¹⁷⁸¹ (b) The Ohio filing deadline not only burdens the associational rights of independent voters and candidates, it also places a significant state-imposed restriction on a nationwide electoral process. A burden that falls unequally on independent candidates or on new or small political parties impinges, by its very nature, on associational choices protected by the First Amendment, and discriminates against those candidates and voters whose political preferences lie outside the existing political parties. And in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest, because the President and Vice President are the only elected officials who represent all the voters in the Nation, and the impact of the votes cast in each State affects the votes cast in other States. Pp. 1570-1573.

(c) None of the three interests that Ohio seeks to further by its early filing deadline justifies that deadline. As to the State's asserted interest in voter education, it is unrealistic in the modern world to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label. Moreover, it is not self-evident that the interest in voter education is served at all by the early filing deadline. The State's asserted interest in equal treatment for partisan and independent candidates is not achieved by imposing the early filing deadline on both, since, although a candidate participating in a primary election must declare his candidacy on the same date as an independent, both the burdens and benefits of the respective requirements are materially different, and the reasons for early filing for a primary candidate are inapplicable to independent candidates in the general election. And the State's asserted interest in political stability amounts to a desire to protect existing political parties from competition generated by independent candidates who have previously been affiliated with a party, an interest that conflicts with First Amendment values. The Ohio dead-

line does not serve any state interest "in maintaining the integrity of the various routes to the ballot" for the Presidency, because Ohio's Presidential preference primary does not serve to narrow the field for the general election. *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714, distinguished. The deadline is not drawn to protect the parties from "intraparty feuding" and may actually impair the State's interest in preserving party harmony. Pp. 1573-1579.

664 F.2d 554, reversed.

¹⁷⁸² George T. Frampton, Jr., Washington, D.C., for petitioners.

Joel S. Taylor, Columbus, Ohio, for respondent.

Justice STEVENS delivered the opinion of the Court.

On April 24, 1980, petitioner John Anderson announced that he was an independent candidate for the office of President of the United States. Thereafter, his supporters—by gathering the signatures of registered voters, filing required documents, and submitting filing fees—were able to meet the substantive requirements for having his name placed on the ballot for the general election in November 1980 in all 50 States and the District of Columbia. On April 24, however, it was already too late for Anderson to qualify for a position on the ballot in Ohio and certain other States because the statutory deadlines for filing a statement of candidacy had already passed. The question presented by this case is whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of Anderson's supporters.

The facts are not in dispute. On May 16, 1980, Anderson's supporters tendered a nominating petition containing approximately 11,500 signatures and a statement of candidacy to respondent Celebrezze, the Ohio Secretary of State. These documents would have entitled Anderson to a place on

the ballot if they had been filed on or before March 20, 1980. Respondent refused to accept the petition solely because it had not been filed within the time required by § 3513.25.7 of the Ohio Revised Code.¹ Three days later Anderson and three voters, two registered in Ohio and one in New Jersey, commenced this action in the United States District Court for the Southern District of Ohio, challenging the constitutionality of Ohio's early filing deadline for independent candidates. The District Court granted petitioners' motion for summary judgment and ordered respondent to place Anderson's name on the general election ballot. 499 F.Supp. 121 (1980).

The District Court held that the statutory deadline was unconstitutional on two grounds. It imposed an impermissible burden on the First Amendment rights of Anderson and his Ohio supporters and diluted the potential value of votes that might be cast for him in other States. Moreover, by requiring an independent to declare his candidacy in March without mandating comparable action by the nominee of a political party, the State violated the Equal Protec-

tion Clause of the Fourteenth Amendment. The District Court noted that the State did not advance any administrative reasons for the early deadline and rejected the State's asserted justification that the deadline promoted "political stability." Not only did that interest have diminished importance in a Presidential campaign; it also was adequately vindicated by another statute prohibiting a defeated candidate in a party primary from running as an independent.²

The Secretary of State promptly appealed and unsuccessfully requested expedited review in both the Court of Appeals and this Court, but apparently did not seek to stay the District Court's order.³ The election was held while the appeal was pending. In Ohio Anderson received 254,472 votes, or 5.9 percent of the votes cast; nationally, he received 5,720,060 votes or approximately 6.6 percent of the total.⁴

The Court of Appeals reversed. It first inferred that the Court's summary affirmances in *Sweetenham v. Rhodes*, 318 F.Supp. 1262 (SD Ohio 1970), summarily aff'd, 409 U.S. 942, 93 S.Ct. 282, 34 L.Ed.2d 214 (1972), and *Pratt v. Begley*, 352

1. Section 3513.25.7 provides, in pertinent part:

"Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election, except persons desiring to become independent joint candidates for the offices of governor and lieutenant governor, shall file no later than four p.m. of the seventy-fifth day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in section 3513.261 [3513.26.1] of the Revised Code...." Ohio Rev.Code Ann. § 3513.25.7 (Supp.1982).

The Code sets the first Tuesday after the first Monday in June as the date of the primary election, *id.*, § 3501.01(E), a date that fell on June 3, 1980. Thus the filing deadline for independent candidates was March 20, 1980, a date 229 days in advance of the general election. Section 3513.25.7(A) requires independent candidates in statewide elections, including Presidential primaries, to submit nominating petitions signed by no less than 5,000 and no more than 15,000 qualified voters.

2. Anderson's name had been entered in the Republican primary in Ohio and 26 other States

before he made his decision to run as an independent, and he actually competed unsuccessfully in nine Republican primaries. Nevertheless, the parties agree that his timely withdrawal from the Ohio primary avoided the application of the State's "sore loser" statute, Ohio Rev.Code Ann. § 3513.04 (Supp.1982), which disqualifies a candidate who ran unsuccessfully in a party primary from running as an independent in the general election. See 499 F.Supp. 121, 135, 140 (SD Ohio 1980); 664 F.2d 554, 556, n. 3 (CA6 1981).

3. After the Court of Appeals denied a motion for expedited appeal, respondent filed a petition for a writ of certiorari before judgment in this Court, together with a motion to expedite consideration of the petition. The motion and the petition were both denied before the election in November 1980. 448 U.S. 914 and 918, 101 S.Ct. 34 and 41, 65 L.Ed.2d 1177, 1181 (1980). Even though the 1980 election is over, the case is not moot. See *Storer v. Brown*, 415 U.S. 724, 737, n. 8, 94 S.Ct. 1274, 1282, n. 8, 39 L.Ed.2d 714 (1974).

4. 14 America Votes, A Handbook of Contemporary American Election Statistics 18-19, 312, 317 (1981).

F.Supp. 328 (ED Ky.1970), summarily aff'd, 409 U.S. 943, 93 S.Ct. 282, 34 L.Ed.2d 214 (1972), had implicitly sustained the validity of early filing deadlines. Then, correctly recognizing the limited precedential effect to be accorded summary dispositions,⁵ the

¹⁷⁸⁵ Court of Appeals independently reached the same conclusion. It held that Ohio's early deadline "ensures that voters making the important choice of their next president have the opportunity for a careful look at the candidates, a chance to see how they withstand the close scrutiny of a political campaign." 664 F.2d 554, 563 (CA6 1981).

In other litigation brought by Anderson challenging early filing deadlines in Maine and Maryland, the Courts of Appeals for the First and Fourth Circuits affirmed District Court judgments ordering Anderson's name placed on the ballot. See *Anderson v. Quinn*, 495 F.Supp. 730 (Me.), affirmance order, 634 F.2d 616 (CA1 1980); *Anderson v. Morris*, 500 F.Supp. 1095 (Md.),

5. The Court of Appeals quite properly concluded that our summary affirmances in *Sweetenham v. Gilligan* and *Pratt v. Begley* were "a rather slender reed" on which to rest its decision. 664 F.2d, at 560. We have often recognized that the precedential effect of a summary affirmance extends no further than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); see *Fusari v. Steinberg*, 419 U.S. 379, 391-392, 95 S.Ct. 533, 540-541, 42 L.Ed.2d 521 (1975) (BURGER, C.J., concurring). Neither *Sweetenham* nor *Pratt* involved state-imposed filing deadlines for Presidential candidates. See Juris. Statement in *Pratt v. Begley*, O.T.1972, No. 70-48, p. 4 (independent candidates for U.S. House of Representatives); Juris. Statement in *Sweetenham v. Rhodes*, O.T.1972, No. 70-15, p. 5 (independent candidates for Governor of Ohio and U.S. House of Representatives). Further, *Sweetenham* arose on review of the District Court's refusal to grant injunctive relief placing appellants on the ballot. The court relied at least in part on appellants' failure to take steps to become candidates before the primary, a date 90 days after the challenged filing deadline, or indeed to tender nominating petitions at any time before filing suit. See *id.*, at 30. In *Pratt*, the District Court dismissed a

aff'd, 636 F.2d 55 (CA4 1980).⁶ The conflict among the Circuits on an important question of constitutional law led us to grant certiorari. 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982). We now reverse.

I

After a date toward the end of March, even if intervening events create unanticipated political opportunities, no independent candidate may enter the Presidential race and seek to place his name on the Ohio general election ballot. Thus the direct impact of Ohio's early filing deadline falls upon aspirants for office. Nevertheless, as we have recognized, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972).

complaint seeking declaratory as well as injunctive relief, concluding that the early filing deadline was reasonable, but it could have refused to place appellants on the ballot on the equitable ground that they had not submitted nominating petitions until more than two and a half months after the party nominees were chosen in the primary. 352 F.Supp., at 329.

As the Court of Appeals acknowledged, our remand in *Mandel v. Bradley*, *supra*, does not control this case. Plaintiff, who had sought to run as an independent candidate for United States Senator from Maryland, challenged a Maryland code provision imposing both an early filing deadline and a numerical signature requirement. Neither of the parties addressed the constitutionality of the filing date standing alone. The District Court improperly relied on a prior summary affirmance by this Court to strike down the restriction, and failed to undertake an independent examination of the merits. We remanded for factual findings. *Id.*, 432 U.S., at 177-178, 97 S.Ct., at 2241. On remand, the District Court found that the early filing deadline imposed unconstitutional burdens on the plaintiff. *Bradley v. Mandel*, 449 F.Supp. 983, 986-989 (Md.1978).

6. Anderson also prevailed on First Amendment and Equal Protection Clause grounds in *Anderson v. Hooper*, 498 F.Supp. 895, 905 (NM 1980), and on state-law grounds in *Greaves v. Mills*, 497 F.Supp. 283 (ED Ky.1980), rev'd in part on other grounds, 664 F.2d 600 (CA6 1981).

Our primary concern is with the tendency of ballot access restrictions "to limit the field of candidates from which voters might choose." Therefore, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Ibid.*

The impact of candidate eligibility requirements on voters implicates basic constitutional rights.⁷ Writing for a unanimous Court in *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958), Justice Harlan stated that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." In our first review of Ohio's electoral scheme, *Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968), this Court explained the interwoven strands of "liberty" affected by ballot access restrictions:

"In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course,

rank among our most precious freedoms."

As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish*, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." *Ibid.*; *Williams v. Rhodes, supra*, 393 U.S., at 31, 89 S.Ct., at 10. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens.⁸

[1,2] Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates. We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic pro-

7. In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the "fundamental rights" strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests. See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *Illinois Elections Bd. v. Socialist Workers Party, supra*.

8. See *Williams v. Rhodes*, 393 U.S., at 31, 89 S.Ct., at 10 ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes"); *id.*, at 41, 89 S.Ct., at 15 (Harlan, J., concurring in result) ("[B]y denying the appellants any opportunity to participate in the procedure by which the President is selected, the State has eliminated the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights"); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S., at 186, 99 S.Ct., at 991 ("[A]n election campaign is a means of disseminating ideas as well as attaining political office.... Overbroad restrictions on ballot access jeopardize this form of political expression").

cesses." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.⁹

[1789] [3] Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. *Storer, supra*, 415 U.S., at 730, 94 S.Ct., at 1279. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In

9. We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates. *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); cf. *Storer v. Brown*, 415 U.S., at 738-746, 94 S.Ct., at 1283-1286, *Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (re-mand to assess burden placed by State's signature-gathering requirements on independent candidates). The State also has the right to prevent distortion of the electoral process by the device of "party raiding," the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election. *Rosario v. Rockefeller*,

passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See *Williams v. Rhodes, supra*, 393 U.S., at 30-31, 89 S.Ct., at 10; *Bullock v. Carter*, 405 U.S., at 142-143, 92 S.Ct., at 855; *American Party of Texas v. White*, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979). The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made." [1790] *Storer v. Brown, supra*, 415 U.S., at 730, 94 S.Ct., at 1279.¹⁰

II

An early filing deadline may have a substantial impact on independent-minded voters. In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to

410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); cf. *Kusper v. Pontikes*, 414 U.S. 51, 59-61, 94 S.Ct. 303, 308-309, 38 L.Ed.2d 260 (1973).

We have also upheld restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values. See *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (incumbent Justice of the Peace may not seek election to state legislature; persons holding specified state and county offices are deemed automatically to resign from present office if they run for another elective office).

10. See *American Party of Texas v. White, supra*, 415 U.S., at 760-761, 94 S.Ct., at 1305-1306; *Illinois Elections Bd. v. Socialist Workers Party, supra*, 440 U.S., at 188-189, 99 S.Ct., at 992 (BLACKMUN, J., concurring); cf. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982).

center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidacies. See A. Bickel, *Reform and Continuity* 87-89 (1971). Yet Ohio's filing deadline prevents persons who wish to be independent candidates from entering the significant political arena established in the State by a Presidential election campaign—and creating new political coalitions of Ohio voters—at any time after mid to late March.¹¹ At this point developments in campaigns for the major-party nominations have only begun, and the major parties will not adopt their nominees and platforms for another five months. Candidates and supporters within the major parties thus have the political advantage of continued flexibility; for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage because of the competitive nature of the electoral process.

1791

11. As Professor Bickel has written:

"Never has it been as evident as in 1968 that unforeseen occurrences in the early portion of an election year can fundamentally affect all political expectations. For administrative reasons, there has to be a cutoff date sometime, but there is more than a little of the capricious in laws that force a commitment to act (within or without the major parties) in at least two states before such an upheaval as President Johnson's withdrawal on March 31, 1968, and in many states before important primaries, not to mention such an event as the assassination of Robert F. Kennedy on June 5, 1968." A. Bickel, *Reform and Continuity* 88 (1971).

Indeed, because it takes time for an independent Presidential candidate and his supporters to gather the requisite 5,000 signatures on nominating petitions, the independent must decide to run well in advance of the March filing deadline. In contrast, Ohio law provides for the automatic inclusion of the Presidential nominees of the major parties on the general election ballot, Ohio Rev.Code Ann. § 3505.10 (Supp. 1982), even if they have never filed a statement of candidacy in Ohio. Their identities are not established until after the major-party conventions in August.

12. Five individuals were able to qualify as independent Presidential candidates in Ohio in 1980. 499 F.Supp., at 143-144. But their inclusion on the ballot does not negate the burden imposed on the associational rights of independent-minded voters. These candidates—Gus Hall of the

Communist Party, Richard Congress of the Socialist Workers Party, Deirdre Griswold of the Workers World Party, Ed Clark of the Libertarian Party, and Barry Commoner of the Citizen's Party—represented ideologically committed minor parties which did not proceed through the "minor party" provisions of the Ohio Election Code. Their candidacies corresponded to the protected First Amendment interests of some Ohio voters. But, unlike Anderson's, they were unlikely adequately to satisfy the voting and associational interests of voters whose independent political leanings crystallized as a result of developments in the course of the primary campaigns. Cf. *Developments in the Law—Elections*, 88 Harv.L.Rev. 1111, 1143, n. 130 (1975) ("From the standpoint of potential supporters, minor parties and independent candidates differ in that the latter are free from ties and obligations to party organizations, and support for them is not so total a commitment of political allegiance because it does not require renunciation of major party affiliation").

If the State's filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a grouping of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties. As we recognized in *Williams v. Rhodes*, 393 U.S., at 33, 89 S.Ct., at 11, "[s]ince the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few months before the election."¹² Indeed, several important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conven-

1792

Our focus on the associational rights of independent-minded voters distinguishes the burden imposed by Ohio's early filing deadline from that created by the California disaffiliation provision upheld in *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Although a disaffiliation provision may preclude such voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements.

tions during the summer.¹³ But under § 3513.25.7, a late-emerging Presidential candidate outside the major parties, whose positions on the issues could command widespread community support, is excluded from the Ohio general election ballot. The "Ohio system thus denies the 'disaffected' not only a choice of leadership but a choice on the issues as well." *Williams v. Rhodes*, *supra*, at 33, 89 S.Ct., at 11.

Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline, it also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline. When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.¹⁴

[4] It is clear, then, that the March filing deadline places a particular burden on an identifiable segment of Ohio's independent-minded voters. See *supra*, at p. 1571. As our cases have held, it is espe-

cially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.¹⁵ "Our ballot access cases ... focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements v. Fashing*, 457 U.S. 957, 964, 102 S.Ct. 2836, 2844, 73 L.Ed.2d 508 (1982) (plurality opinion), quoting *Lubin v. Panish*, 415 U.S., at 716, 94 S.Ct., at 1320.¹⁶

A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. *Clements v. Fashing*, *supra*, 457 U.S., at 964–965, 102 S.Ct., at 2844 (plurality opinion). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restric-

13. See generally App. to Brief for American Civil Liberties Union as *Amicus Curiae* 10a–12a; Bickel, *supra* n. 11, at 87.

14. See *Bradley v. Mandel*, 449 F.Supp., at 986–987 (findings of fact of three-judge District Court on remand from this Court).

15. In *Bullock v. Carter*, 405 U.S., at 144, 92 S.Ct., at 856, the Court noted that the disparity in voting power created by high candidate filing fees "cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause." Indeed, the impact fell on an undetermined number of voters. *Id.*, at 149, 92 S.Ct., at 858. Yet the filing fees were unconstitutional because of the "obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system." *Id.*, at 144, 92 S.Ct., at 856.

See also L. Tribe, *American Constitutional Law* 774–775 (1978). As Professor Tribe explains, although candidate eligibility require-

ments may exclude particular candidates, it remains possible that an eligible candidate will "adequately reflect the perspective of those who might have voted for a candidate who has been excluded." *Id.*, at 774, n. 2. But courts quite properly "have more carefully appraised the fairness and openness of laws that determine which political groups can place any candidate of their choice on the ballot." *Id.*, at 774. Cf. *Developments in the Law—Elections*, *supra* n. 12, at 1218, and n. 5.

16. In addition, because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny. *Id.*, at 1136, n. 87; see generally *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 783, n. 4, 82 L.Ed. 1234 (1938); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 73–88 (1980).

tions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S., at 186, 99 S.Ct., at 991; *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251, 77 S.Ct. 1203, 1211-1212, 1 L.Ed.2d 1311 (1957) (opinion of Warren, C.J.).¹⁷ In short, the primary values protected by the First Amendment—"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964)—are served when election campaigns are not monopolized by the existing political parties.

[5, 6] Furthermore, in the context of a Presidential election, state-imposed restrictions¹⁸ implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected

17. See generally V. Key, *Politics, Parties, and Pressure Groups* 278-303 (3d ed. 1952). As Professor Bickel has observed,

"Again and again, minor parties have led from a flank, while the major parties still followed opinion down the middle. In time, the middle has moved, and one of the major parties or both occupy the ground reconnoitered by the minor party;

"[A]s an outlet for frustration, often as a creative force and a sort of conscience, as an ideological governor to keep major parties from speeding off into an abyss of mindlessness, and even just as a technique for strengthening a group's bargaining position for the future, the minor party would have to be invented if it did not come into existence regularly enough." Bickel, *supra* n. 11, at 79-80.

18. The Constitution expressly delegates authority to the States to regulate the selection of Presidential electors. U.S. Const., Art. II, § 1; see *McPherson v. Blacker*, 146 U.S. 1, 35, 13 S.Ct. 3, 10, 36 L.Ed. 869 (1892). But, as we have emphasized, "we must reject the notion that Art. II, § 1, gives the States power to impose bur-

by the votes cast for the various candidates in other States.¹⁹ Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders.²⁰ Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." *Cousins v. Wigoda*, 419 U.S. 477, 490, 95 S.Ct. 541, 549, 42 L.Ed.2d 595 (1975). The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

III

The State identifies three separate interests that it seeks to further by its early

dens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." *Williams v. Rhodes*, 393 U.S., at 29, 89 S.Ct., at 9.

19. As the District Court recognized in this case:

"The goal of voters such as plaintiff Eisenstat in states where Anderson will appear on the ballot is to amass enough electoral votes to elect Anderson. Ohio's deadline, by denying Anderson a place on the ballot, removes the sixth largest slate of electors from Anderson's reach and thereby reduces the total pool of electoral votes for which he may compete nationwide by 25 electors." 499 F.Supp., at 126.

20. In approximately two-thirds of the States and the District of Columbia, filing deadlines for independent Presidential candidates occur in August or September. The deadlines in a number of other States are in June or July. Anderson was barred by early filing deadlines in Ohio and four other States; he succeeded in obtaining court orders requiring placement on the ballot in all five. See *supra*, at 1567 and 1568, and n. 6.

filing deadline for independent Presidential candidates: voter education, equal treatment for partisan and independent candidates, and political stability. We now examine the legitimacy of these interests and the extent to which the March filing deadline serves them.

Voter Education

There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election. Moreover, the Court of Appeals correctly identified that interest as one of the concerns that motivated the Framers' decision not to provide for direct popular election of the President.²¹ We are persuaded, however, that the State's important and legitimate interest in voter education does not justify the specific restriction on participation in a Presidential election that is at issue in this case.

The passage of time since the Constitutional Convention in 1787 has brought about two changes that are relevant to the reasonableness of Ohio's statutory requirement that independents formally declare their candidacy at least seven months in advance of a general election. First, although it took days and often weeks for even the most rudimentary information about important events to be transmitted from one part of the country to another in 1787,²² today even trivial details about national candidates are instantaneously communicated nationwide in both verbal and visual form. Second, although literacy was far from universal in 18th-century Amer-

ica,²³ today the vast majority of the electorate not only is literate but also is informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates. In the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label.

Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues. In *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), the Court considered the validity of a Tennessee statute requiring residence in the State for one year and in the county for three months as a prerequisite for registration to vote. The Court held the statute unconstitutional, specifically rejecting the argument that the requirements were justified by the State's interest in voter education.

"Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is 'necessary' to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections." *Id.*, at 358, 92 S.Ct., at 1011 (footnotes omitted).

This reasoning applies with even greater force to a Presidential election, which re-

21. "The importance of this interest was made clear at the Constitutional Convention in 1787, where the delegates debated extensively the means of selecting the President. The alternatives that received the most attention in the early debates were appointment by the national legislature and election by the people at large. The former would have made it impossible to guarantee an independent executive. Election by the people was also disfavored, in part because of concern over the ignorance of the populace as to who would be qualified for the job." 664 F.2d, at 563-564.

See *Williams v. Rhodes*, *supra*, 393 U.S., at 43-44, 89 S.Ct., at 16-17 (Harlan, J., concurring in

result) ("The [Electoral] College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large").

22. See 1 A. Beveridge, *The Life of John Marshall* 250-287 (1916).

23. See K. Lockridge, *Literacy in Colonial New England* 1-43, 72-87 (1974); L. Soltow & E. Stevens, *The Rise of Literacy and the Common School in the United States: A Socioeconomic Analysis to 1870*, pp. 28-57 (1981).

ceives more intense publicity.²⁴ Nor are we persuaded by the State's assertion that, unless a candidate actually files a formal declaration of candidacy in Ohio by the March deadline, Ohio voters will not realize that they should pay attention to his candidacy. Brief for Respondent 38. The validity of this asserted interest is undermined by the State's willingness to place major-party nominees on the November ballot even if they never campaigned in Ohio.

It is also by no means self-evident that the interest in voter education is served at all by a requirement that independent candidates must declare their candidacy before the end of March in order to be eligible for a place on the ballot in November. Had the requirement been enforced in Ohio, petitioner Anderson might well have determined that it would be futile for him to allocate any of his time and money to campaigning in that State. The Ohio electorate might thereby have been denied whatever benefits his participation in local debates could have contributed to an understanding of the issues. A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we observed in another First Amendment context, it is often true "that the best means to that end is

to open the channels of communication rather than to close them." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346 (1976).²⁵

Equal Treatment

We also find no merit in the State's claim that the early filing deadline serves the interest of treating all candidates alike. Brief for Respondent 33. It is true that a candidate participating in a primary election must declare his candidacy on the same date as an independent. But both the burdens and the benefits of the respective requirements are materially different, and the reasons for requiring early filing for a primary candidate are inapplicable to independent candidates in the general election.

The consequences of failing to meet the statutory deadline are entirely different for party primary participants and independents. The name of the nominees of the Democratic and Republican Parties will appear on the Ohio ballot in November even if they did not decide to run until after Ohio's March deadline had passed, but the independent is simply denied a position on the ballot if he waits too long.²⁶ Thus, under Ohio's scheme, the major parties may include all events preceding their national conventions in the calculus that pro-

24. Cf. *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (upholding Act of Congress forbidding States to disqualify voters in Presidential elections for failure to meet state residency requirements).

25. A similar analysis applies to the Court of Appeals' assertion that the State promotes informed voter choices by assuring that the voters are apprised "by a date certain of most of their options." 664 F.2d, at 564-565. This reasoning assumes that the most relevant point of decision occurs in March, although the voter is not actually required to make a final choice among eligible candidates until November.

Moreover, as a matter of practical politics, the electoral process contains its own cure for voters' ignorance about a particular candidate. Unknown candidates simply do not win large numbers of votes. A key goal of every political campaign is to promote the candidate's name identification among the electorate.

26. It is true, of course, that Ohio permits "write-in" votes for independents. We have previously noted that this opportunity is not an adequate substitute for having the candidate's name appear on the printed ballot.

"It is suggested that a write-in procedure, under § 18600 *et seq.*, without a filing fee would be an adequate alternative to California's present filing-fee requirement. The realities of the electoral process, however, strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.... [A candidate] relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot." *Lubin v. Panish*, 415 U.S., at 719, n. 5, 94 S.Ct., at 1321, n. 5.

Indeed, in the 1980 Presidential election, only 27 votes were cast in the State of Ohio for write-in candidates. 14 America Votes, *supra* n. 4, at 317.

1800 duces their respective nominees and campaign platforms, but the independent's judgment must be based on a history that ends in March.²⁷

The early filing deadline for a candidate in a party's primary election is adequately justified by administrative concerns. Seventy-five days appears to be a reasonable time for processing the documents submitted by candidates and preparing the ballot. 499 F.Supp., at 134. The primary date itself must be set sufficiently in advance of the general election; furthermore, a Presidential preference primary must precede the national convention, which is regularly held during the summer. Finally, the successful participant in a party primary generally acquires the automatic support of an experienced political organization; in the Presidential contest he obtains the support of convention delegates.

Neither the administrative justification nor the benefit of an early filing deadline is applicable to an independent candidate. Ohio does not suggest that the March deadline is necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed.²⁸ In addition, the early deadline does not correspond to a potential benefit for the independent, as it does for the party candidate. After filing his statement of candidacy, the independent does not participate in a structured intraparty contest to determine who will receive organizational support; he must develop support by other means. In short, "equal treatment" of par-

tisan and independent candidates simply is not achieved by imposing the March filing deadline on both. As we have written, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jennness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971).

Political Stability

Although the Court of Appeals did not discuss the State's interest in political stability, that was the primary justification advanced by respondent in the District Court, 499 F.Supp., at 134, and it is again asserted in this Court. Respondent's brief explains that the State has a substantial interest in protecting the two major political parties from "damaging intraparty feuding." Brief for Respondent 41. According to respondent, a candidate's decision to abandon efforts to win the party primary and to run as an independent "can be very damaging to state political party structure." Anderson's decision to run as an independent, respondent argues, threatened to "splinter" the Ohio Republican Party "by drawing away its activists to work in his 'independent' campaign." *Id.*, at 37; see *id.*, at 44.

Ohio's asserted interest in political stability amounts to a desire to protect existing political parties from competition—competition for campaign workers, voter support, and other campaign resources—generated by independent candidates who have previ-

27. The Court of Appeals recognized the significance of the flexibility that results from being able to make a later decision, but concluded that the right to select a nominee for the Presidency at a convention conducted in the late summer is a right possessed by the political party, not a right possessed by the nominee personally. "By contrast," the court reasoned, "the independent's candidacy has no existence apart from that of the candidate, and no interest in flexibility in choosing its nominee." 664 F.2d, at 567. Not only did the Court of Appeals err by ignoring the associational rights of voters who desire to support the independent's candidacy, but its rationale simply has no bearing on the State's asserted "equality" interest.

28. Respondent conceded in the District Court that the nominating petitions filed on March 20 remain unprocessed in his office until June 15, when he transmits them to county boards of election. The boards do not begin to verify the signatures until the period July 1 to July 15. Finally, the Secretary of State does not certify the names of Presidential candidates, including independents, for inclusion on the ballot until late August, after the party nominating conventions. According to the District Court, based on the stipulated facts, it appears that no more than 75 days are necessary to perform these tasks. 499 F.Supp., at 133-134, 142.

ously been affiliated with the party.²⁹ Our evaluation of this interest is guided by two of our prior cases, *Williams v. Rhodes*, and *Storer v. Brown*.

In *Williams v. Rhodes* we squarely held that protecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena. Addressing Ohio's claim that it "may validly promote a two-party system in order to encourage compromise and political stability," we wrote:

"The fact is, however, that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Williams v. Rhodes*, 393 U.S., at 31–32, 89 S.Ct., at 10–11.

Thus in *Williams v. Rhodes* we concluded that First Amendment values outweighed the State's interest in protecting the two major political parties.

On the other hand, in *Storer v. Brown* we upheld two California statutory provisions that restricted access by independent

candidates to the general election ballot. Under California law, a person could not run as an independent in November if he had been defeated in a party primary that year or if he had been registered with a political party within one year prior to that year's primary election. We stated that "California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government," and that destruction of "the political stability of the system of the State" could have "profound consequences for the entire citizenry." 415 U.S., at 736, 94 S.Ct., at 1282. Further, we approved the State's goals of discouraging "independent candidacies prompted by short-range political goals, pique, or personal quarrel." *Id.*, at 735, 94 S.Ct., at 1281.

Thus in *Storer* we recognized the legitimacy of the State's interest in preventing "splintered parties and unrestrained factionalism." But we did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters.³⁰ Political competition that draws resources away from the major parties cannot, for that reason alone, be condemned as "unrestrained factionalism." Instead, in *Storer* we examined the two challenged provisions in the context of California's electoral system. By requiring a candidate to remain in the intraparty competition once the disaffiliation deadline had passed, and by giving conclusive effect to the winnowing process performed by party members in the primary election, the challenged provisions were an essential part of "a general state

29. This particular interest in "political stability" must not be confused with the interest that is implicated by rules designed to prevent "party raiding," see n. 9, *supra*. That interest, sufficient to sustain the challenged restriction in *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), is applicable only to party primaries; but this case involves restrictions on access to the general election ballot. Nor is it the same interest that justifies a rule disqualifying a person who voted in a party primary from signing a petition supporting the candidacy of an independent. Such a rule reflects a "policy of confining each voter to a

single nominating act—either voting in the partisan primary or a signature on an independent petition." *Storer v. Brown*, 415 U.S., at 743, 94 S.Ct., at 1285; see *American Party of Texas v. White*, 415 U.S., at 785–786, 94 S.Ct., at 1308.

30. Even though the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests.

policy aimed at maintaining the integrity of the various routes to the ballot." Moreover, we pointed out that the policy "involves no discrimination against independents." *Storer, supra*, at 733, 94 S.Ct., at 1280.

Ohio's challenged restriction is substantially different from the California provisions upheld in *Storer*. As we have noted, the early filing deadline does discriminate against independents. And the deadline is neither a "sore loser" provision nor a disaffiliation statute.³¹ Furthermore, it is important to recognize that *Storer* upheld the State's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of California.³² The State's interest in regulating a nationwide Presidential election is not nearly as strong; no State could singlehandedly assure "political stability" in the Presidential context. The Ohio deadline does not serve any state interest in "maintaining the integrity of the various routes to the ballot" for the Presidency, because Ohio's Presidential preference primary does not serve to narrow the field for the general election. A major party candidate who loses the Ohio primary, or who does not even run in Ohio, may nonetheless appear on the November general election ballot as the party's nominee. In addition, the national scope of the competition for delegates at the Presidential nominating conventions assures that "intraparty feuding" will continue until August.

More generally, the early filing deadline is not precisely drawn to protect the parties from "intraparty feuding," whatever legitimacy that state goal may have in a Presidential election. If the deadline is designed

to keep intraparty competition within the party structure, its coverage is both too broad and too narrow. It is true that in this case § 3513.257 was applied to a candidate who had previously competed in party primaries and then sought to run as an independent. But the early deadline applies broadly to independent candidates who have not been affiliated in the recent past with any political party. On the other hand, as long as the decision to run is made before the March deadline, Ohio does not prohibit independent candidacies by persons formerly affiliated with a political party, or currently participating in intraparty competition in other States—regardless of the effect on the political party structure.

Moreover, the early deadline for filing as an independent may actually impair the State's interest in preserving party harmony. As Professor Bickel perceptively observed:

"The characteristic American third party, then, consists of a group of people who have tried to exert influence within one of the major parties, have failed, and later decide to work on the outside. States in which there is an early qualifying date tend to force such groups to create minor parties without first attempting to influence the course taken by a major one. For a dissident group is put to the choice of foregoing major-party primary and other prenomination activity by organizing separately early on in an election year, or losing all opportunity for action as a third party later." Bickel, *supra*, n. 11, at 87-88.

The same analysis, of course, is applicable to a "dissident group" that coalesces

discernible legislative design." 499 F.Supp., at 135.

31. Section 3513.257 is a filing deadline, not a "sore loser" statute. It blocks access to the general election ballot 75 days before the primary, at a time when, by definition, no candidate has yet lost the party primary. Ohio has a separate "sore loser" statute, which is admittedly inapplicable to Anderson because he made a timely withdrawal from the Ohio Republican primary. See n. 2, *supra*. Furthermore, as the District Court observed, "it is clear that R.C. 3513.257 acts as a disaffiliation provision only by mere happenstance, not by any reasonably

32. Hall and Tyner, the Presidential and Vice Presidential candidates, apparently complied with the one-year disaffiliation provision. *Storer*, 415 U.S., at 738, 94 S.Ct., at 1283. The disaffiliation statute was challenged by *Storer* and Frommshagen, who wished to run as independents for the United States House of Representatives.

around an independent candidate rather than attempting to form a new political party.

We conclude that Ohio's March filing deadline for independent candidates for the office of President of the United States cannot be justified by the State's asserted interest in protecting political stability.

"For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn v. Blumstein*, 405 U.S., at 343 [92 S.Ct., at 1003]. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button*, 371 U.S. [415], 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 [(1963)]. If the State has open to it a 'less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.' *Kusper v. Pontikes*, 414 U.S. 51, 58-59, 94 S.Ct. 303, 308, 38 L.Ed.2d 260 (1973).

IV

We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused. Under any realistic appraisal, the "extent and nature" of the burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline.

The judgment of the Court of Appeals is *Reversed*.

Justice REHNQUIST, with whom Justice WHITE, Justice POWELL, and Justice O'CONNOR join, dissenting.

Article I of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" who shall se-

lect the President of the United States. U.S. Const., Art. II, § 1, cl. 2. This provision, one of few in the Constitution that grants an express plenary power to the States, conveys "the broadest power of determination" and "[i]t recognizes that [in the election of a President] the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 7, 36 L.Ed. 869 (1892) (emphasis added).

In exercising this power, the Ohio Legislature has provided alternative routes to its general election ballot for capture of Ohio's Presidential electoral votes. *Political parties* can earn the right to field a Presidential candidate in the general election in one of two ways. Parties that obtained at least 5% of the vote in the preceding gubernatorial or Presidential election are automatically entitled to have a candidate on the general election ballot. Other political parties are required to file 120 days before the primary election (in 1980 the date was February 4) a statement of intent to participate in the primary, together with petitions containing signatures of voters equal to 1% of the votes cast in the last gubernatorial or Presidential election (in 1980 approximately 28,000 signatures would have been required). Ohio Rev.Code Ann. § 3517.01 (Supp.1982).

Ohio also offers *candidates* different routes to the general election ballot. Should a candidate decide to seek the nomination of a political party participating in Ohio's primary election by capturing delegate votes for the party's national convention, the candidate must file a declaration of candidacy and a nominating petition bearing signatures from 1,000 members of the party: the filing must occur no later than the 75th day before the first Tuesday after the first Monday in June of the election year (in 1980 the date was March 20). Ohio Rev.Code Ann. § 3513.05 (Supp.1982). Of course, because a political party has earned the right to put on the ballot a candidate chosen at its national convention,

a candidate seeking the nomination of that party could forgo the Ohio primary process and, if he should win at the national convention, still be placed on the ballot as a party candidate. If a candidate chooses to run as a nonparty candidate, he must file, ¹⁸⁰² by the same date as a party candidate participating in the primary, a statement of candidacy and a nominating petition bearing the signatures of 5,000 qualified voters. Ohio Rev.Code Ann. § 3513.25.7 (Supp. 1982). Since a nonparty candidate does not participate in a national convention, obviously he cannot benefit from the routes made available to political parties.

Today the Court holds that the filing deadline for nonparty candidates in this statutory scheme violated the First Amendment rights of 1980 Presidential hopeful John Anderson and Anderson's supporters. Certainly, absent a court injunction ordering that his name be placed on the ballot, Anderson and his supporters would have been injured by Ohio's ballot access requirements; by failing to comply with the filing deadline for nonparty candidates Anderson would have been excluded from Ohio's 1980 general election ballot.¹ But the Constitution does not require that a State allow any particular Presidential candidate to be on its ballot, and so long as the Ohio ballot access laws are rational and allow nonparty candidates reasonable access to the general election ballot, this Court should not interfere with Ohio's exercise of its Art. II, § 1, cl. 2, power. Since I believe that the Ohio laws meet these criteria, I dissent.

In support of its conclusion that Ohio's filing deadline "may have a substantial impact on independent-minded voters," *ante*, at 1570, the Court explains that "[i]f the State's filing deadline were later in the year, a newly-emergent independent candi-

date could serve as the focal point for a grouping of Ohio voters." *Ante*, at 1571. ¹⁸⁰⁹ In addition, the Court says: "Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline, it also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline." *Ante*, at 1572. Finally, the Court intimates that the effect of the filing deadline for nonparty candidates is that election campaigns are "monopolized by the existing political parties." *Ante*, at 1573. While if true these findings might provide a basis for finding a substantial impact on nonparty candidates and their supporters, the Court's conclusions are simply unsupported by the record in this case.

Anderson makes no claim, and thus has offered no evidence to show, that the early filing deadline impeded his "signature-gathering efforts." That alone should be enough to prevent the Court from finding that the deadline has such an impact. A statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co. v. Knott*, 235 U.S. 23, 26, 35 S.Ct. 2, 3, 59 L.Ed. 105 (1914). What information the record does contain on this point leads to a contrary conclusion. The record shows that in 1980 five independent candidates submitted nominating petitions with the necessary 5,000 signatures by the March 20 deadline and thus qualified for the general election ballot in Ohio. See *ante*, at 1571, n. 12. The Court of Appeals found that this number of nonparty candidates was not unusual in Ohio. 664 F.2d 554, 565 n. 14 (1981). The importance of this kind of evidence was noted in *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), where the Court said: "Past experience will be a helpful, if not

Ante, at 1575 n. 26. Until today the Court had not squarely so held and in fact in earlier decisions the Court had treated the availability of write-in candidacies as quite relevant. See *Storer v. Brown*, 415 U.S. 724, 736, n. 7, 94 S.Ct. 1274, 1282, n. 7, 39 L.Ed.2d 714 (1974).

1. Anderson would not have been totally excluded from participating in the general election since Ohio allows for "write-in" candidacies. The Court suggests, however, that this is of no relevance because a write-in procedure "is not an adequate substitute for having the candidate's name appear on the printed ballot."

always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Id.*, at 742, 94 S.Ct., at 1285. The most obvious conclusion to be drawn from "past experience" in this case is that a "reasonably diligent independent candidate" choosing to take Ohio's nonparty route has little difficulty in obtaining the necessary signatures in a timely fashion. See *ibid.*²

The Court's intimation that the Ohio filing deadline infringes on a nonparty candidate who makes the decision to run for President after the March deadline is similarly without support in the record.³ Certainly, if such candidates emerge, the Ohio deadline will prevent their running in the general election as nonparty candidates. Just as certainly, however, Anderson was not such a candidate. Anderson formally announced his candidacy for the Presidency on June 8, 1979—over nine months before Ohio's March 20 deadline. And the record does not reveal the existence of any other individual who decided to become a nonparty Presidential candidate after the March 20 deadline. In fact, as noted above, the five individuals who did seek electoral votes through the nonparty alternative had no trouble making this decision before the filing deadline and had no trouble qualifying for a position on the general election ballot.

2. Furthermore, as the Court of Appeals pointed out, one could speculate that nonparty candidates would have more difficulty meeting the signature requirements of various States if the States had less discretion in setting their own deadlines. "We also note that the effect of limiting the states' discretion would be to require uniformity, thus compressing the signature gathering and campaigning requirements in the various states. This would greatly increase the burden on all candidates, who may presently devote their scarce resources to a few states at a time." 664 F.2d 554, 565, n. 13 (1981).

3. It would seem that realistically speaking, there is little chance in these modern times of a serious candidate for the Presidency making his decision to run after the spring of the election year. We might judicially take notice that it is presently the spring of the year preceding an

election year and numerous candidates have already thrown their hats into the campaign ring. For proof of a contrary point, the Court cites by reference to the candidacies of Martin Van Buren in 1848, James B. Weaver in 1892, Theodore Roosevelt in 1912, and Robert La Follette in 1924. *Ante*, at 1571, n. 13. The most obvious response is that the method of Presidential campaigning has so changed since the last of these campaigns that such candidacies are not as likely to arise today. It also should be noted that most, if not all, of these men decided to seek the Presidency far in advance of their actual nomination. Finally, none of these individuals were elected in the years in question and those who split from their political parties may well have been responsible for the election going to a different party, a result which this Court, in *Storer v. Brown*, *supra*, said States were at liberty to try to avoid.

Finally, there is nothing in the record to indicate that this is a case where "independent-minded voters" are prevented from rallying behind a candidate selected later in the election year so as to guarantee "major parties" a monopoly on the election process. Like-minded voters who do not want to participate in an existing political party are at complete liberty to form a new political party and obtain for themselves the same flexibility that established political parties have in the selection of their nominee for President. It is true that Ohio provides this benefit only where a group of voters acts with some foresight and shows a degree of support among the electorate, but this case presents no challenge to these requirements.

On the record before us, the effect of the Ohio filing deadline is quite easily summarized: it requires that a candidate, who has already decided to run for President, decide by March 20 which route his candidacy will take. He can become a nonparty candidate by filing a nominating petition with 5,000 signatures and assure himself a place on the general election ballot. Or he can become a party candidate and take his chances in securing a position on the general election ballot by seeking the nomination of a party's national convention. Anderson chose the latter route and submitted in a timely fashion his nominating petition for Ohio's Republican Primary. Then, realiz-

ing that he had no chance for the Republican nomination. Anderson sought to change the form of this candidacy. The Ohio filing deadline prevented him from making this change. Quite clearly, rather than prohibiting him from seeking the Presidency, the filing deadline only ¹²¹²prevented Anderson from having two shots at it in the same election year.

Thus, Ohio's filing deadline does not create a restriction "denying the franchise to citizens," such as those faced by the Court in *Kramer v. Union School District*, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969) (emphasis omitted), *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (*per curiam*), *Evans v. Cornman*, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970), *Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970), and *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Likewise, Ohio's filing deadline does not create a restriction that makes it "virtually impossible" for new-party candidates or nonparty candidates to qualify for the ballot, such as those addressed in *Williams v. Rhodes*, 393 U.S. 23, 25, 89 S.Ct. 5, 7, 21 L.Ed.2d 24 (1968), *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), and *Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). Yet in deciding this case, we are not without guidance from prior decisions by this Court.

In *Storer v. Brown*, the Court was faced with a California statute prohibiting an independent candidate from affiliating with a political party for 12 months preceding the primary election. This required a prospective candidate to decide on the form of his candidacy at a date some eight months earlier than Ohio requires. In upholding, in the face of a First Amendment challenge, this disaffiliation statute and a statute preventing candidates who had lost a primary from running as independents, the Court determined that the laws were "expressive of a general state policy aimed at maintaining the integrity of various routes to the ballot," 415 U.S., at 733, 94 S.Ct., at

1280, and that the statutes furthered "the State's interest," described by the Court as "compelling," "in the stability of its political system." *Id.*, at 736, 94 S.Ct., at 1282. The Court explained its holding, saying:

"The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it ¹²¹³is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

"[The disaffiliation statute] carries very similar credentials. It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidates prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party.

"A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See *The Federalist*, No. 10 (Madison). It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling

and as outweighing the interest the candidate and his supporters may have in making a late rather than early decision to seek independent ballot status.... [T]he Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot." *Id.*, at 735-736, 94 S.Ct., at 1281-1282 (emphasis added).

1814

The similarities between the effect of the Ohio filing deadline and the California disaffiliation statute are obvious.

Refusing to own up to the conflict its opinion creates with *Storer*, the Court tries to distinguish it, saying that it "did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters." *Ante*, at 1577. The Court asserts that the Ohio filing deadline is more like the statutory scheme in *Williams v. Rhodes*, *supra*, which was designed to protect "two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly." *Ante*, at 1577 (quoting *Williams v. Rhodes*, 393 U.S., at 32, 89 S.Ct., at 11). See also *ante*, at 1577 ("In *Williams v. Rhodes* we squarely held that protecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena." But see *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*)). "Ohio's asserted interest in political stability," says the Court, "amounts to a desire to protect existing political parties from competition." *Ante*,

4. The Court seeks comfort from the idea that the filing deadline is not a "sore loser" statute which prevents a candidate who is defeated in a primary from running as an independent candidate. *Ante*, at 1578, n. 31. But the effect of the deadline in this case is much the same. Under the Court's approach, so long as a candidate pulls out of his party race before the votes of

at 1576. But this simply is not the case. The Ohio filing deadline in no way makes it "virtually impossible." 393 U.S., at 25, 89 S.Ct., at 7, for new parties or nonparty candidates to secure a position on the general election ballot. It does require early decisions. But once a decision is made, there is no claim that the additional requirements for new parties and nonparty candidates are too burdensome. In fact, past experience has shown otherwise. What the Ohio filing deadline prevents is a candidate such as Anderson from seeking a party nomination and then, finding that he is rejected by the party, bolting from the party to form an independent candidacy. This is precisely the same behavior that California sought to prevent by the disaffiliation statute this Court upheld in *Storer*.

[The Court makes other attempts to distinguish this case from the obviously similar *Storer* case. The Court says Ohio has no interest in preventing "intraparty feuding" because by the nature of the Presidential nominating conventions "intraparty feuding" will continue until August." *Ante*, at 1578.⁴ This is certainly no different than the situation in *Storer*. Essentially all of the battles for party nominations in California would have taken place during the 12 months before the party primaries—the period during which an independent candidate had to be disaffiliated with any party.

1815

The Court further notes: "*Storer* upheld the State's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of California. The State's interest in regulating a nationwide Presidential election is not nearly as strong." *Ante*, at 1578 (footnote omitted). The Court's characterization of the election simply is incorrect. The Ohio general elec-

the party are counted, he must be recognized as a "newly emergent independent candidate" whose candidacy is created by a dramatic change in national events. To the contrary, I submit that such a candidate is no more than a "sore loser" who ducked out before putting his popularity to the vote of his party.

tion in 1980, among other things, was for the appointment of Ohio's representatives to the electoral college. U.S. Const., Art. II, § 1, cl. 2. The Court throughout its opinion fails to come to grips with this fact. While Ohio may have a lesser interest in who is ultimately selected by the electoral college, its interest in who is supported by its own Presidential electors must be at least as strong as its interest in electing other representatives. While the Presidential electors may serve a short term and may speak only one time on behalf of the voters they represent, their role in casting Ohio's electoral votes for a President may be second to none in importance. See *Burroughs v. United States*, 290 U.S. 534, 545, 54 S.Ct. 287, 290, 78 L.Ed. 484 (1934).

The Court suggests that *Storer* is not controlling since in that case the Court held that the California disaffiliation statute was not discriminatory because party candidates were prohibited from affiliating with another political party for the 12 months preceding the primary election. The Court says that Ohio's filing deadline does discriminate against nonparty candidates. But merely saying it is so does not make it so. As explained later, nonparty candidates and party candidates wishing to participate in Ohio's primary election must file on the same date. It is true that party candidates can obtain a place on the general election ballot without participating in the primary by obtaining a party's nomination at its national convention. But this is a benefit given to the party and only incidentally received by the winning party candidate; it provides no benefit to one who seeks but fails to obtain a party nomination. On the whole, party candidates have a more difficult chore in getting a place on the general election ballot than do nonparty candidates; a fact of which Anderson and other unsuccessful rivals for the 1980 Republican nomination are doubtless aware. Nonparty candidates, if they file in time and submit the necessary nominating petitions, are assured of a place on the ballot; party candidates must win a party nomination.

In a final attempt to distinguish *Storer*, the Court argues that even if Ohio is serving some interest in preventing "intraparty

feuding," the filing deadline is "both too broad and too narrow"; the Court even argues that the filing deadline may in fact impair this interest. *Ante*, at 1578. The Court claims that the effect of the deadline is too broad because it applies "to independent candidates who have not been affiliated in the recent past with any political party." *Ibid.* Its effect is too narrow because it "does not prohibit independent candidacies by persons formerly affiliated with a political party, or currently participating in intraparty competition." *Ibid.* The Court says the filing deadline may impair the States' interest in preserving political stability because it may force independent-minded voters "to create minor parties without first attempting to influence the course taken by a major one." *Ibid.* (quoting A. Bickel, *Reform and Continuity* 87-88 (1971)). But each of these criticisms could have been asserted against the California disaffiliation statute.

The point the Court misses is that in cases like this and *Storer*, we have never required that States meet some kind of "narrowly tailored" standard in order to pass constitutional muster. In reviewing election laws like Ohio's filing deadline, we have said before that a court's job is to ensure that the State "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Jenness v. Fortson*, 403 U.S. 431, 439, 91 S.Ct. 1970, 1974, 29 L.Ed.2d 554 (1971). If it does not freeze the status quo, then the State's laws will be upheld if they are "tied to a particularized legitimate purpose, and [are] in no sense invidious or arbitrary." *Rosario v. Rockefeller*, 410 U.S. 752, 762, 93 S.Ct. 1245, 1252, 36 L.Ed.2d 1 (1973). See also *Marston v. Lewis*, 410 U.S. 679, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973) (*per curiam*); *Burns v. Fortson*, 410 U.S. 686, 93 S.Ct. 1209, 35 L.Ed.2d 633 (1973) (*per curiam*); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (*per curiam*); *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). The Court tries to avoid the rules set forth in some of

these cases, saying that such rules were "applicable only to party primaries" and that "this case involves restrictions on access to the general election ballot." *Ante*, at 1576, n. 29. The fallacy in this reasoning is quite apparent: one cannot restrict access to the primary ballot without also restricting access to the general election ballot. As the Court said in *Storer v. Brown*: "The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates." 415 U.S., at 735, 94 S.Ct., at 1281 (footnote omitted).

The Ohio filing deadline easily meets the test described above. In the interest of the "stability of its political system," *Storer v. Brown*, 415 U.S., at 736, 94 S.Ct., at 1282, Ohio must be "free to assure itself that [a nonparty] candidate is a serious contender, truly independent, and with a satisfactory level of community support." *Id.*, at 746, 94 S.Ct., at 1286. This interest alone is sufficient to support Ohio ballot access laws which require that candidates for Presidential electors choose their route early, thus preventing a person who has decided to run for a party nomination from switching to a nonparty candidacy after he discovers that he is not the favorite of his party. But this is not the only interest furthered by Ohio's laws.

Ohio maintains that requiring an early declaration of candidacy gives its voters a better opportunity to take a careful look at the candidates and see how they withstand the close scrutiny of a political campaign. The Court does not dispute the legitimacy of this interest. But the Court finds that "the State's important and legitimate interest in voter education does not justify the specific restriction on participation in a Presidential election that is at issue in this case." *Ante*, at 1574. Admitting that the Constitutional Convention in 1787, in establishing the electoral college and providing plenary authority to the States for election of its members to the college, had a heightened awareness of the importance of an

informed electorate, the Court tells us how times have changed in the past 200 years and how the problem of ensuring an informed electorate is no longer so great. The Court explains: In the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate.... Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Ante*, at 1574.

I cannot agree with the suggestion that the early deadline reflects a lack of "faith" in the voters. That Ohio wants to give its voters as much time as possible to gather information on the potential candidates would seem to lead to the contrary conclusion. There is nothing improper about wanting as much time as possible in which to evaluate all available information when making an important decision. Besides, the Court's assertion that it does not take 7 months to inform the electorate is difficult to explain in light of the fact that Anderson allowed himself some 19 months to complete this task; and we are all well aware that Anderson's decision to make an early go of it is not atypical. The Court's reliance on the quote from *Dunn v. Blumstein*, 405 U.S., at 358, 92 S.Ct., at 1011, that campaign spending and voter education occur "largely during the month before an election" cannot be taken seriously when applied to Presidential campaigns. I see no basis whatsoever for the Court's conclusion that "[t]his reasoning applies with even greater force to a Presidential election." *Ante*, at 1574.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S., at 14-15, 96 S.Ct., at 632. This is especially true in the context of candidates for President. "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly

stated." *Burroughs v. United States*, 290 U.S., at 545, 54 S.Ct., at 290. I believe the Court of Appeals aptly explained the present day need in saying:

"To be sure, some of the impediments to an informed electorate that existed in 1787 have been removed by our extensive present day communications network, through which news of a candidacy is transmitted nationwide virtually simultaneously with its announcement. However, rapid communication can only inform the electorate of the existence of a candidacy. Equally crucial to a meaningful vote is the electorate's ability to evaluate those who would be President once aware of their desire to fill the post. Ohio may very reasonably conclude that requiring Presidential candidates to be in the public eye for a significant time materially advances its interest in careful selection." 664 F.2d, at 564.⁵

Ohio also has an interest in assisting its citizens in apportioning their resources among various candidates running for the Presidency. The supply of resources needed for operating a political campaign is limited; this is especially true of two of the most important commodities, money and volunteers. By doing its best to present the field of candidates by spring, right at the time that campaigns begin to intensify, Ohio allows those of its citizens who want to provide support other than voting, adequate time to decide how to divide up that support. While the Court does not give attention to this interest, it is certainly a legitimate one and an important one in terms of the effective campaigning of Presidential candidates.

The Court seems to say that even if these interests would otherwise be served by Ohio's filing deadline, they are "undermined by the State's willingness to place major-party nominees on the November ballot even if they never campaigned in Ohio." *Ante*, at 1575. The Court fails to follow its own warning that "[s]ometimes the grossest discrimination can lie in treat-

ing things that are different as though they were exactly alike." *Ante*, at 1576 (quoting *Jenness v. Fortson*, 403 U.S., at 442, 91 S.Ct., at 1976). Underlying the Court's entire opinion is the idea that "independent candidates" are treated differently than candidates fielded by the "major parties." But this observation is no more productive than comparing apples and oranges and wondering at the difference between them.

First of all, any political party, major, minor, or otherwise, can qualify for a position on Ohio's general election ballot and have that position held open until later in the election year. The reasonableness of this approach is fairly obvious. Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election. See *Cousins v. Wigoda*, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). The Court suggests that if such a procedure is so important for political parties, then followers of a particular candidate should also have more time. See, e.g., *ante*, at 1575, n. 27. This argument simply does not wash. Any group of like-minded voters, if they are of sufficient numbers, is free to form a political party and ensure more time in selecting a candidate to express their views. But followers of a particular candidate need no time to find such a representative; they are organized around that candidate. Such followers have no real organized existence in the absence of that particular candidate.

Comparing party candidates and nonparty candidates is somewhat more useful, but does not change the result. Any candidate wanting to pursue his place on the Ohio general election ballot through Ohio's preliminary procedures must file at the same time. Nevertheless, should an individual who has not filed a statement of candidacy

5. The Ohio Legislature's decision is not that different from the decision by the Federal Government requiring television networks to provide early access for Presidential candidates. Recently, in *CBS, Inc. v. FCC*, 453 U.S. 367, 101

S.Ct. 2813, 69 L.Ed.2d 706 (1981), this Court held that under the Federal Communications Act a Presidential candidate had a right to television access as early as December 1979, some 11 months before the election.

ers and the rights of candidates do not lend themselves to neat separation." 405 U.S., at 143, 92 S.Ct., at 856.⁸ Second, the function of the election process is "to winnow out and finally reject all but the chosen candidates." *Storer*, 415 U.S., at 735, 94 S.Ct., at 1281, not to provide a means of giving vent to "short-range political goals, pique, or personal quarrel[s]." *Ibid.* Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently. *Id.*, at 730, 94 S.Ct., at 1279.

Accordingly, we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls. See *Munro*, 479 U.S., at 199, 107 S.Ct., at 539-540. Petitioner offers no persuasive reason to depart from these precedents. Reasonable regulation of elections does not require voters to espouse positions that they do not support; it does require them to act in a timely fashion if they wish to express their views in the voting booth. And there is nothing content based about a flat ban on all forms of write-in ballots.

The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*. Applying that standard, we conclude that, in light of the adequate ballot access afforded under Hawaii's election code, the State's ban on write-in voting imposes only a limited burden on voters' rights to make free choices and to associate politically through the vote.

B

[4] We turn next to the interests asserted by Hawaii to justify the burden imposed by its prohibition of write-in voting. Because we have already concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction. Here, the State's interests outweigh petitioner's limited interest in waiting

until the eleventh hour to choose his preferred candidate.

Hawaii's interest in "avoid[ing] the possibility of unrestrained factionalism at the general election," *Munro*, 415 U.S., at 196, 107 S.Ct., at 538, provides adequate justification for its ban on write-in voting in November. The primary election is "an integral part of the entire election process," *Storer*, *supra*, 415 U.S., at 735, 94 S.Ct., at 1281, and the State is within its rights to reserve "[t]he general election ballot ... for major struggles ... [and] not a forum for continuing intraparty feuds." *Ibid.*; *Munro*, *supra*, 479 U.S., at 196, 107 S.Ct., at 537-538, 539-540. The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies. Hawaii further promotes the two-stage, primary-general election process of winnowing out candidates, see *Storer*, *supra*, 415 U.S., at 735, 94 S.Ct., at 1281-1282, by permitting the unopposed victors in certain primaries to be designated officeholders. See Haw.Rev.Stat. §§ 12-41, 12-42 (1985). This focuses the attention of voters upon contested races in the general election. This would not be possible, absent the write-in voting ban.

Hawaii also asserts that its ban on write-in voting at the primary stage is necessary to guard against "party raiding." *Tashjian*, 479 U.S., at 219, 107 S.Ct., at 551. Party raiding is generally defined as "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson*, 460 U.S., at 789, n. 9, 103 S.Ct., at 1570, n. 9. Petitioner suggests that, because Hawaii conducts an open primary, this is not a cognizable interest. We disagree.⁴⁴⁰ While voters may vote on any ticket in Hawaii's primary, the State requires that party candidates be "member[s] of the party," Haw.Rev.Stat. § 12-3(a)(7) (1985), and prohibits candidates from filing "nomination papers both as a party candidate and as a

8. Indeed, voters, as well as candidates, have participated in the so-called ballot access cases.

E.g., *Anderson*, 460 U.S., at 783, 103 S.Ct., at 1567.

stated." *Burroughs v. United States*, 290 U.S., at 545, 54 S.Ct., at 290. I believe the Court of Appeals aptly explained the present day need in saying:

"To be sure, some of the impediments to an informed electorate that existed in 1787 have been removed by our extensive present day communications network, through which news of a candidacy is transmitted nationwide virtually simultaneously with its announcement. However, rapid communication can only inform the electorate of the existence of a candidacy. Equally crucial to a meaningful vote is the electorate's ability to evaluate those who would be President once aware of their desire to fill the post. Ohio may very reasonably conclude that requiring Presidential candidates to be in the public eye for a significant time materially advances its interest in careful selection." 664 F.2d, at 564.⁵

Ohio also has an interest in assisting its citizens in apportioning their resources among various candidates running for the Presidency. The supply of resources needed for operating a political campaign is limited; this is especially true of two of the most important commodities, money and volunteers. By doing its best to present the field of candidates by spring, right at the time that campaigns begin to intensify, Ohio allows those of its citizens who want to provide support other than voting, adequate time to decide how to divide up that support. While the Court does not give attention to this interest, it is certainly a legitimate one and an important one in terms of the effective campaigning of Presidential candidates.

The Court seems to say that even if these interests would otherwise be served by Ohio's filing deadline, they are "undermined by the State's willingness to place major-party nominees on the November ballot even if they never campaigned in Ohio." *Ante*, at 1575. The Court fails to follow its own warning that "[s]ometimes the grossest discrimination can lie in treat-

ing things that are different as though they were exactly alike." *Ante*, at 1576 (quoting *Jennness v. Fortson*, 403 U.S., at 442, 91 S.Ct., at 1976). Underlying the Court's entire opinion is the idea that "independent candidates" are treated differently than candidates fielded by the "major parties." But this observation is no more productive than comparing apples and oranges and wondering at the difference between them.

First of all, any political party, major, minor, or otherwise, can qualify for a position on Ohio's general election ballot and have that position held open until later in the election year. The reasonableness of this approach is fairly obvious. Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election. See *Cousins v. Wigoda*, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). The Court suggests that if such a procedure is so important for political parties, then followers of a particular candidate should also have more time. See, e.g., *ante*, at 1575, n. 27. This argument simply does not wash. Any group of like-minded voters, if they are of sufficient numbers, is free to form a political party and ensure more time in selecting a candidate to express their views. But followers of a particular candidate need no time to find such a representative; they are organized around that candidate. Such followers have no real organized existence in the absence of that particular candidate.

Comparing party candidates and nonparty candidates is somewhat more useful, but does not change the result. Any candidate wanting to pursue his place on the Ohio general election ballot through Ohio's preliminary procedures must file at the same time. Nevertheless, should an individual who has not filed a statement of candidacy

5. The Ohio Legislature's decision is not that different from the decision by the Federal Government requiring television networks to provide early access for Presidential candidates. Recently, in *CBS, Inc. v. FCC*, 453 U.S. 367, 101

S.Ct. 2813, 69 L.Ed.2d 706 (1981), this Court held that under the Federal Communications Act a Presidential candidate had a right to television access as early as December 1979, some 11 months before the election.

be chosen by a political party as its nominee, Ohio does not attempt to keep that candidate off of its general election ballot. To the extent that this is an advantage to the successful party candidate, however, it is a benefit given to the party, which the party candidate only receives incidentally.⁶

¹²²² Furthermore, to the extent the party candidate is benefited, such benefit is counterbalanced by the risk he takes of not getting the party nomination at all. Only the non-party candidate can assure himself of a place on the general election ballot. Many party candidates may seek the party's nomination, but only one of them will get it.

The Court's decision in this case is not necessary for the protection of like-minded voters who want to support an independent candidate; Ohio laws already protect such voters. This case presents a completely different story. John Anderson decided some 19 months before the 1980 general election to run for President. He decided to run as a Republican Party candidate. When Anderson sought to get on the Ohio ballot after the March 20 deadline, he was not a "newly emergent independent candidate" whose candidacy had been created by dramatic changes in the election campaign. He was a party candidate who saw impending rejection by his party and rather than throw his support to the party's candidate or some other existing candidacy, Anderson wanted to bolt and have a second try.

¹²²³ The Court's opinion protects this particular kind of candidate—an individual who decides well in advance to become a Presidential candidate, decides which route to follow in seeking a position on the general

election ballot, and, after seeing his hopes turn to ashes, wants to try another route. The Court's opinion draws no line; I presume that a State must wait until all party nominees are chosen and then allow all unsuccessful party candidates to refight their party battles by forming an "independent" candidacy. I find nothing in the Constitution which requires this result. For this reason I would affirm the judgment of the Court of Appeals.



460 U.S. 824, 75 L.Ed.2d 580

Charles A. BOWSHER, Comptroller
General of the United States, et
al., Petitioners,

v.

MERCK & CO., INC.

MERCK & CO., INC., Petitioner,

v.

Charles A. BOWSHER, Comptroller
General of the United States and
United States.

Nos. 81-1273, 81-1472.

Argued Dec. 1, 1982.

Decided April 19, 1983.

Comptroller General brought action
seeking access to records of private con-

6. The Court says that nevertheless this exposes a serious weakness in the State's claim that it wants to put all the candidates before its voters early so they will have time to evaluate the candidates. Even if the Court were correct, the other interests advanced by the State would justify the filing deadline for nonparty candidates. But I do not believe the Court is correct.

The Court ignores the fact that voters learn about a nonparty candidacy only by listening to what the candidate has to say. Reality requires a different conclusion about party candidates. Even before a party candidate is chosen, the public will know a great deal about that candidate because of its knowledge about the party.

Of course, the Court is correct that the focus of a party will vary somewhat according to the candidate chosen. But this proves only that the time between the choosing of the party's nominee and the general election should be sufficient to allow the voters to evaluate the party's candidate. It does not prove that the voters need as much time evaluating the party candidate as they need for an individual who does not run as the representative of any particular established views. It would in fact be quite reasonable for a State to require, in furtherance of its voter education interest, that the nonparty candidate put himself before the public at an earlier time than it requires of the party candidate.

vertising might cause a reduction in price competition, which, in turn, might result in higher airline rates. This argument is not supported by any legislative or judicial findings.

Even on the assumption that the Court's economic reasoning is sound and restrictions on price advertising could affect rates in this manner, the airlines have not sustained their burden of proving that compliance with the NAAG guidelines would have a "significant" effect on their ability to market their product and, therefore, on their rates.⁷ Surely Congress could not have intended to pre-empt every state and local law and regulation that similarly increases the airlines' costs of doing business and, consequently, has a similar "significant impact" upon their rates.

For these reasons, I respectfully dissent.



504 U.S. 428, 119 L.Ed.2d 245

1428 Alan B. BURDICK, Petitioner

v.

Morris TAKUSHI, Director of Elections
of Hawaii, et al.

No. 91-535.

Argued March 24, 1992.

Decided June 8, 1992.

Registered voter brought action against
Hawaii Director of Elections and related par-

7. They have not demonstrated, for example, that the costs of purchasing the space for the "Restrictions box" required by § 2.1, or the broadcast time to state the two-sentence disclosure required by § 2.2, will have a significant effect on rates. Nor can it realistically be maintained that § 2.2's requirement that words such as "sale," "discount," or "reduced" may only be used if the fare is, in fact, on sale (i.e., is available for a limited time and is substantially below the usual price) will hinder the airlines' ability to market and sell their low-priced fares. Finally, they surely have not proved that § 2.4's require-

ties, claiming that Hawaii's prohibition on write-in voting violated First and Fourteenth Amendments. The United States District Court for the District of Hawaii struck down prohibition and denied stay pending appeal. The Court of Appeals, 846 F.2d 587, reversed, and ordered District Court to abstain until state courts had determined whether Hawaii's election laws in fact permitted write-in voting. The District Court certified questions, and the Hawaii Supreme Court, 70 Haw. 498, 776 P.2d 824, ruled that write-in voting was prohibited. Thereafter, the District Court, 737 F.Supp. 582, Harold M. Fong, J., granted injunctive relief, and appeal was taken. The Court of Appeals for the Ninth Circuit, 937 F.2d 415, reversed, and voter petitioned for certiorari. The Supreme Court, Justice White, held that Hawaii's prohibition on write-in voting did not unreasonably infringe upon its citizens' rights under First and Fourteenth Amendments.

Court of Appeals affirmed.

Justice Kennedy filed dissenting opinion, in which Justices Blackmun and Stevens joined.

1. Constitutional Law ¶82(8), 274.2(3)

Not every law that imposes any burden upon right to vote must be subject to strict scrutiny; instead, rigorousness of inquiry into propriety of state election law depends upon extent to which challenged regulation

ment that fares be advertised only if sufficient seats are available to meet demand or the extent of unavailability disclosed will make it impossible for the airlines to market and sell different seats at different prices. That section expressly permits the airlines to advertise low-priced fares that are available in limited quantities: it simply requires that they include a disclaimer, such as "This fare may not be available when you call." See National Association of Attorneys General, Task Force on Air Travel Industry, Guidelines § 2.4 (1988), reprinted in App. to Brief for United States as *Amicus Curiae* 24a-25a.

burdens First and Fourteenth Amendment rights. U.S.C.A. Const.Amends. 1, 14.

2. Constitutional Law §82(8), 274.2(1)

When state election law subjects First and Fourteenth Amendment rights to "severe" restriction, regulation must be narrowly drawn to advance state interest of compelling importance, but when state election law imposes only "reasonable, nondiscriminatory restrictions" upon First and Fourteenth Amendment rights, state's important regulatory interests are generally sufficient to justify restrictions. U.S.C.A. Const.Amends. 1, 14.

3. Constitutional Law §82(8), 91

Elections §27

Hawaii's ban on write-in voting imposed only limited burden on voters' rights to make free choices and to associate politically through the vote and, therefore, had only to further important regulatory interests to be upheld, in light of adequate ballot access afforded under Hawaii's election code. U.S.C.A. Const.Amends. 1, 14; HRS §§ 11-61, 11-62, 12-2.5 to 12-7, 12-31.

4. Elections §27

Hawaii's interests in avoiding possibility of unrestrained factionalism at general election and in guarding against "party raiding" outweighed voter's limited interest in waiting until 11th hour to choose his preferred candidate and provided adequate justification for Hawaii's ban on write-in voting at general election.

5. Constitutional Law §82(8), 274.2(3)

When state's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights, prohibition against write-in voting will be presumptively valid, since any burden on right to vote for candidate of one's choice will be light and normally will be counterbalanced by very state interests sup-

porting ballot access scheme. U.S.C.A. Const.Amends. 1, 14.

6. Elections §15

While no right is more precious in free country than that of having voice in election of those who make laws under which, as good citizens, we must live, right to vote is right to participate in electoral process that is necessarily structured to maintain integrity of democratic system.

Syllabus *

Petitioner, a registered Honolulu voter, filed suit against respondent state officials, claiming that Hawaii's prohibition on write-in voting violated his rights of expression and association under the First and Fourteenth Amendments. The District Court ultimately granted his motion for summary judgment and injunctive relief, but the Court of Appeals reversed, holding that the prohibition, taken as part of the State's comprehensive election scheme, does not impermissibly burden the right to vote.

Held: Hawaii's prohibition on write-in voting does not unreasonably infringe upon its citizens' rights under the First and Fourteenth Amendments. Pp. 2062-2068.

(a) Petitioner assumes erroneously that a law that imposes any burden on the right to vote must be subject to strict scrutiny. This Court's cases have applied a more flexible standard: A court considering a state election law challenge must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. *Anderson v. Celebrezze*, 460 U.S. 780, 780-789, 103 S.Ct. 1564, 1569-1570, 75 L.Ed.2d 547. Under this standard, a regulation must be narrowly drawn to advance a state inter-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

est of compelling importance only when it subjects the voters' rights to "severe" restrictions. *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711. If it imposes only "reasonable, nondiscriminatory restrictions" upon those rights, the State's important regulatory interests are generally sufficient to justify the restrictions. *Anderson, supra*, 460 U.S., at 788, 103 S.Ct., at 1570. Pp. 2062-2064.

(b) Hawaii's write-in vote prohibition imposes a very limited burden upon voters' rights to associate politically through the vote and to have candidates of their choice placed on the ballot. Because the State's election laws provide easy access to the primary ballot until the cutoff date for the filing of nominating petitions, two months before the primary, any burden on the voters' rights is borne only by those who fail to identify their candidate of choice until shortly before the primary. An ¹⁴³⁰interest in making a late rather than an early decision is entitled to little weight. Cf. *Storer v. Brown*, 415 U.S. 724, 736, 94 S.Ct. 1274, 1281, 39 L.Ed.2d 714. Pp. 2064-2066.

(c) Hawaii's asserted interests in avoiding the possibility of unrestrained factionalism at the general election and in guarding against "party raiding" during the primaries are legitimate and are sufficient to outweigh the limited burden that the write-in voting ban imposes upon voters. Pp. 2066-2067.

(d) Indeed, the foregoing analysis leads to the conclusion that where, as here, a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights, a write-in voting prohibition will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme. Pp. 2067-2068.

937 F.2d 415 (CA9 1991), affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and

O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 2068.

Arthur N. Eisenberg, for petitioner.

Steven S. Michaels, for respondents.

¹⁴³⁰Justice WHITE delivered the opinion of the Court.

The issue in this case is whether Hawaii's prohibition on write-in voting unreasonably infringes upon its citizens' rights under the First and Fourteenth Amendments. Petitioner contends that the Constitution requires Hawaii to provide for the casting, tabulation, and publication of write-in votes. The Court of Appeals for the Ninth Circuit disagreed, holding that the prohibition, taken as part of the State's comprehensive election scheme, does not impermissibly burden the right to vote. 937 F.2d 415, 422 (1991). We affirm.

I

Petitioner is a registered voter in the city and county of Honolulu. In 1986, only one candidate filed nominating papers to run for the seat representing petitioner's district in the Hawaii House of Representatives. Petitioner wrote to state officials inquiring about Hawaii's write-in voting policy and received a copy of an opinion letter issued by the Hawaii Attorney General's Office stating that the State's election law made no provision for write-in voting. 1 App. 38-39, 49.

Petitioner then filed this lawsuit, claiming that he wished to vote in the primary and general elections for a person who had not filed nominating papers and that he wished to vote in future elections for other persons whose names might not appear on the ballot. *Id.*, at 32-33. The United States District Court for the District of Hawaii concluded that the ban on write-in voting violated petitioner's First Amendment right of expression and association and entered a preliminary

injunction ordering respondents to provide for the casting and tallying of write-in votes in the November 1986 general ¹⁴³election. App. to Pet. for Cert. 67a-77a. The District Court denied a stay pending appeal. 1 App. 76-107.

The Court of Appeals entered the stay, *id.*, at 109, and vacated the judgment of the District Court, reasoning that consideration of the federal constitutional question raised by petitioner was premature because "neither the plain language of Hawaii statutes nor any definitive judicial interpretation of those statutes establishes that the Hawaii legislature has enacted a ban on write-in voting," *Burdick v. Takushi*, 846 F.2d 587, 588 (CA9 1988). Accordingly, the Court of Appeals ordered the District Court to abstain, see *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), until state courts had determined whether Hawaii's election laws permitted write-in voting.¹

On remand, the District Court certified the following three questions to the Supreme Court of Hawaii:

"(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

"(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

"(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes and to

count and publish write-in votes?" App. to Pet. for Cert. 56a-57a.

¹⁴³Hawaii's high court answered "No" to all three questions, holding that Hawaii's election laws barred write-in voting and that these measures were consistent with the State's Constitution. *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824 (1989). The United States District Court then granted petitioner's renewed motion for summary judgment and injunctive relief, but entered a stay pending appeal. 737 F.Supp. 582 (Haw. 1990).

The Court of Appeals again reversed, holding that Hawaii was not required to provide for write-in votes:

"Although the prohibition on write-in voting places some restrictions on [petitioner's] rights of expression and association, that burden is justified in light of the ease of access to Hawaii's ballots, the alternatives available to [petitioner] for expressing his political beliefs, the State's broad powers to regulate elections, and the specific interests advanced by the State." 937 F.2d, at 421.²

In so ruling, the Ninth Circuit expressly declined to follow an earlier decision regarding write-in voting by the Court of Appeals for the Fourth Circuit. See *ibid.*, citing *Dixon v. Maryland State Administrative Bd. of Election Laws*, 878 F.2d 776 (CA4 1989). We granted certiorari to resolve the disagreement on this important question. 502 U.S. 1003, 112 S.Ct. 635, 116 L.Ed.2d 653 (1991).

II

[1] Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be sub-

actions subsequently were consolidated by the District Court. 1 App. 142.

1. While petitioner's appeal was pending, he became concerned that the Court of Appeals might not enter its decision before the September 1988 primary election. Accordingly, petitioner filed a second suit challenging the unavailability of write-in voting in the 1988 election. *Burdick v. Cavetano*, Civ. No. 99-0365. Coincidentally, petitioner's new suit was filed on the very day that the Ninth Circuit decided the appeal stemming from petitioner's original complaint. The two

2. The Ninth Circuit panel issued its opinion on March 1, 1991. See *Burdick v. Takushi*, 927 F.2d 469. On June 28, 1991, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc, and the panel withdrew its original opinion and issued the version that appears at 937 F.2d 415.

ject to strict scrutiny. Our cases do not so hold.

[43] It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979). It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S.Ct. 533, 536, 93 L.Ed.2d 499 (1986). The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 (1986). Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974).

Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569–1570, 75 L.Ed.2d 547 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would

tie the hands of States seeking to assure that elections are operated equitably and efficiently. See Brief for Petitioner 32–37. Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972); *Anderson, supra*, 460 U.S., at 788, 103 S.Ct., at 1569–1570; *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969).

Instead, as the full Court agreed in *Anderson*, 460 U.S., at 788–789, 103 S.Ct., at 1569–1570; *id.*, at 808, 817, 103 S.Ct., at 1580, 1584–1585 (REHNQUIST, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*, at 789, 103 S.Ct., at 1570; *Tashjian, supra*, 479 U.S., at 213–214, 107 S.Ct., at 547–548.

[2] Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S.,

at 788, 103 S.Ct., at 1569-1570: see also *id.*, at 788-789, n. 9, 103 S.Ct., at 1569-1570, n. 9. We apply this standard in considering petitioner's challenge to Hawaii's ban on write-in ballots.

A

[3] There is no doubt that the Hawaii election laws, like all election regulations, have an impact on the right to vote, *id.*, at 788, 103 S.Ct., at 1569-1570, but it can hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot. Indeed, petitioner understandably does ¹³⁵not challenge the manner in which the State regulates candidate access to the ballot.

To obtain a position on the November general election ballot, a candidate must participate in Hawaii's open primary, "in which all registered voters may choose in which party primary to vote." *Tashjian, supra*, 479 U.S., at 223, n. 11, 107 S.Ct., at 553, n. 11. See Haw.Rev.Stat. § 12-31 (1985). The State provides three mechanisms through which a voter's candidate-of-choice may appear on the primary ballot.

First, a party petition may be filed 150 days before the primary by any group of persons who obtain the signatures of one percent of the State's registered voters.³

3. We have previously upheld party and candidate petition signature requirements that were as burdensome or more burdensome than Hawaii's one-percent requirement. See, e.g., *Norman v. Reed*, 502 U.S. 279, 295, 112 S.Ct. 698, 708, 116 L.Ed.2d 711 (1992); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

4. In *Jenness*, we rejected an equal protection challenge to a system that provided alternative means of ballot access for members of established political parties and other candidates, concluding that the system was constitutional be-

Haw.Rev.Stat. § 11-62 (Supp.1991). Then, 60 days before the primary, candidates must file nominating papers certifying, among other things, that they will qualify for the office sought and that they are members of the party that they seek to represent in the general election. The nominating papers must contain the signatures of a specified number of registered voters: 25 for candidates for statewide or federal office; 15 for state legislative and county races. Haw.Rev.Stat. §§ 12-2.5 to 12-7 (1985 and Supp.1991). The winner in each party advances to the general election. Thus, if a party forms around the candidacy of a single individual and no one else runs on that party ticket, the individual will be elected at the primary and win a place on the November general election ballot.

The second method through which candidates may appear on the Hawaii primary ballot is the established party route.⁴ Established parties that have qualified by petition for three consecutive elections and received a specified percentage of the vote in the preceding election may avoid filing party petitions for 10 years. Haw.Rev.Stat. § 11-61 (1985). The Democratic, Republican, and Libertarian Parties currently meet Hawaii's criteria for established parties. Like new party candidates, established party contenders are required to file nominating papers 60 days before the primary. Haw.Rev.Stat. §§ 12-2.5 to 12-7 (1985 and Supp.1991).⁵

cause it did not operate to freeze the political status quo. 403 U.S., at 438.

5. In *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), the Court concluded that Ohio's early filing deadline for Presidential candidates imposed an unconstitutional burden on voters' freedom of choice and freedom of association. But *Anderson* is distinguishable because the Ohio election scheme, as explained by the Court, provided no means for a candidate to appear on the ballot after a March cutoff date. *Id.*, at 786, 103 S.Ct., at 1568-1569. Hawaii fills this void through its nonpartisan primary ballot mechanism.

The third mechanism by which a candidate may appear on the ballot is through the designated nonpartisan ballot. Nonpartisans may be placed on the nonpartisan primary ballot simply by filing nominating papers containing 15 to 25 signatures, depending upon the office sought, 60 days before the primary. §§ 12-3 to 12-7. To advance to the general election, a nonpartisan must receive 10 percent of the primary vote or the number of votes that was sufficient to nominate a partisan candidate, whichever number is lower. *Hustace v. Doi*, 60 Haw. 282, 289-290, 588 P.2d 915, 920 (1978). During the 10 years preceding the filing of this action, 8 of 26 nonpartisans who entered the primary obtained slots on the November ballot. Brief for Respondents 8.

Although Hawaii makes no provision for write-in voting in its primary or general elections, the system outlined above provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary. Consequently, any burden on voters' freedom of choice and association is borne only by those who fail to identify⁴³⁷ their candidate of choice until days before the primary. But in *Storer v. Brown*, we gave little weight to "the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status." 415 U.S., at 736, 94 S.Ct., at 1282.⁶ Cf. *Rosario v. Rockefeller*, 410 U.S. 752, 757, 93 S.Ct. 1245,

1249-1250, 36 L.Ed.2d 1 (1973). We think the same reasoning applies here and therefore conclude that any burden imposed by Hawaii's write-in vote prohibition is a very limited one. "To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot." *Storer, supra*, 415 U.S., at 736, 94 S.Ct., at 1282.⁷

Because he has characterized this as a voting rights rather than ballot access case, petitioner submits that the write-in prohibition deprives him of the opportunity to cast a meaningful ballot, conditions his electoral participation upon the ⁴³⁸waiver of his First Amendment right to remain free from espousing positions that he does not support, and discriminates against him based on the content of the message he seeks to convey through his vote. Brief for Petitioner 19. At bottom, he claims that he is entitled to cast and Hawaii required to count a "protest vote" for Donald Duck, Tr. of Oral Arg. 5, and that any impediment to this asserted "right" is unconstitutional.

Petitioner's argument is based on two flawed premises. First, in *Bullock v. Carter*, we minimized the extent to which voting rights cases are distinguishable from ballot access cases, stating that "the rights of vot-

6. In *Storer*, we upheld a California ballot access law that refused to recognize independent candidates until a year after they had disaffiliated from a political party.

7. The dissent complains that, because primary voters are required to opt for a specific partisan or nonpartisan ballot, they are foreclosed from voting in those races in which no candidate appears on their chosen ballot and in those races in which they are dissatisfied with the available choices. *Post*, at 2069. But this is generally true of primaries; voters are required to select a ticket, rather than choose from the universe of candidates running on all party slates. Indeed, the Court has upheld the much more onerous requirement that voters interested in participating in a primary election enroll as a member of a

political party prior to the preceding general election. *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). Cf. *American Party of Texas, supra*, 415 U.S., at 786, 94 S.Ct., at 1308 ("[T]he State may determine that it is essential to the integrity of the nominating [petition] process to confine voters to supporting one party and its candidates in the course of the same nominating process").

If the dissent were correct in suggesting that requiring primary voters to select a specific ballot impermissibly burdened the right to vote, it is clear under our decisions that the availability of a write-in option would not provide an adequate remedy. *Anderson, supra*, 460 U.S., at 799, n. 26, 103 S.Ct., at 1575, n. 26; *Lubin v. Panish*, 415 U.S. 709, 719, n. 5, 94 S.Ct. 1315, 1321, n. 5, 39 L.Ed.2d 702 (1974).

ers and the rights of candidates do not lend themselves to neat separation." 405 U.S., at 143, 92 S.Ct., at 856.⁸ Second, the function of the election process is "to winnow out and finally reject all but the chosen candidates." *Storer*, 415 U.S., at 735, 94 S.Ct., at 1281, not to provide a means of giving vent to "short-range political goals, pique, or personal quarrel[s]." *Ibid.* Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently. *Id.*, at 730, 94 S.Ct., at 1279.

Accordingly, we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls. See *Munro*, 479 U.S., at 199, 107 S.Ct., at 539-540. Petitioner offers no persuasive reason to depart from these precedents. Reasonable regulation of elections does not require voters to espouse positions that they do not support; it does require them to act in a timely fashion if they wish to express their views in the voting booth. And there is nothing content based about a flat ban on all forms of write-in ballots.

The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*. Applying that standard, we conclude that, in light of the adequate ballot access afforded under Hawaii's election code, the State's ban on write-in voting imposes only a limited burden on voters' rights to make free choices and to associate politically through the vote.

B

[4] We turn next to the interests asserted by Hawaii to justify the burden imposed by its prohibition of write-in voting. Because we have already concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction. Here, the State's interests outweigh petitioner's limited interest in waiting

until the eleventh hour to choose his preferred candidate.

Hawaii's interest in "avoid[ing] the possibility of unrestrained factionalism at the general election." *Munro*, 415 U.S., at 196, 107 S.Ct., at 538, provides adequate justification for its ban on write-in voting in November. The primary election is "an integral part of the entire election process," *Storer*, *supra*, 415 U.S., at 735, 94 S.Ct., at 1281, and the State is within its rights to reserve "[t]he general election ballot ... for major struggles ... [and] not a forum for continuing intraparty feuds." *Ibid.*; *Munro*, *supra*, 479 U.S., at 196, 107 S.Ct., at 537-538, 539-540. The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies. Hawaii further promotes the two-stage, primary-general election process of winnowing out candidates, see *Storer*, *supra*, 415 U.S., at 735, 94 S.Ct., at 1281-1282, by permitting the unopposed victors in certain primaries to be designated officeholders. See Haw.Rev.Stat. §§ 12-41, 12-42 (1985). This focuses the attention of voters upon contested races in the general election. This would not be possible, absent the write-in voting ban.

Hawaii also asserts that its ban on write-in voting at the primary stage is necessary to guard against "party raiding." *Tashjian*, 479 U.S., at 219, 107 S.Ct., at 551. Party raiding is generally defined as "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson*, 460 U.S., at 789, n. 9, 103 S.Ct., at 1570, n. 9. Petitioner suggests that, because Hawaii conducts an open primary, this is not a cognizable interest. We disagree.⁴⁴⁰ While voters may vote on any ticket in Hawaii's primary, the State requires that party candidates be "member[s] of the party," Haw.Rev.Stat. § 12-3(a)(7) (1985), and prohibits candidates from filing "nomination papers both as a party candidate and as a

8. Indeed, voters, as well as candidates, have participated in the so-called ballot access cases.

E.g., *Anderson*, 460 U.S., at 783, 103 S.Ct., at 1567.

nonpartisan candidate," § 12-3(c). Hawaii's system could easily be circumvented in a party primary election by mounting a write-in campaign for a person who had not filed in time or who had never intended to run for election. It could also be frustrated at the general election by permitting write-in votes for a loser in a party primary or for an independent who had failed to get sufficient votes to make the general election ballot. The State has a legitimate interest in preventing these sorts of maneuvers, and the write-in voting ban is a reasonable way of accomplishing this goal.⁹

We think these legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters.¹⁰

141 III

[5] Indeed, the foregoing leads us to conclude that when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights—as do Hawaii's election laws—a prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme.

9. The State also supports its ban on write-in voting as a means of enforcing nominating requirements, combating fraud, and "fostering informed and educated expressions of the popular will." *Anderson*, 460 U.S., at 796, 103 S.Ct., at 1572-1573.

10. Although the dissent purports to agree with the standard we apply in determining whether the right to vote has been restricted, *post*, at 2069-2070, and implies that it is analyzing the write-in ban under some minimal level of scrutiny, *post*, at 2071, the dissent actually employs strict scrutiny. This is evident from its invocation of quite rigid narrow tailoring requirements. For instance, the dissent argues that the State could adopt a less drastic means of preventing sore-loser candidacies, *ibid.*, and that the State could screen out ineligible candidates through

In such situations, the objection to the specific ban on write-in voting amounts to nothing more than the insistence that the State record, count, and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system. There are other means available, however, to voice such generalized dissension from the electoral process; and we discern no adequate basis for our requiring the State to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws.¹¹

[6] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 534-535, 11 L.Ed.2d 481 (1964). But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system. *Anderson*, *supra*, 460 U.S., at 788, 103 S.Ct., at 1569-1570; *Storer*, 415 U.S., at 730, 94 S.Ct., at 1279. We think that Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of 146 the State's voters.

postelection disqualification rather than a write-in voting ban. *Post*, at 2072.

It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable. *Anderson*, *supra*, at 788, 103 S.Ct., at 1575. The dissent's suggestion that voters are entitled to cast their ballots for unqualified candidates appears to be driven by the assumption that an election system that imposes any restraint on voter choice is unconstitutional. This is simply wrong. See *supra*, at 2063-2064.

11. We of course in no way suggest that a State is not free to provide for write-in voting, as many States do; nor should this opinion be read to discourage such provisions.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice KENNEDY, with whom Justice BLACKMUN and Justice STEVENS, join, dissenting.

The question before us is whether Hawaii can enact a total ban on write-in voting. The majority holds that it can, finding that Hawaii's ballot access rules impose no serious limitations on the right to vote. Indeed, the majority in effect adopts a presumption that prohibitions on write-in voting are permissible if the State's ballot access laws meet constitutional standards. I dissent because I disagree with the presumption, as well as the majority's specific conclusion that Hawaii's ban on write-in voting is constitutional.

The record demonstrates the significant burden that Hawaii's write-in ban imposes on the right of voters such as petitioner to vote for the candidates of their choice. In the election that triggered this lawsuit, petitioner did not wish to vote for the one candidate who ran for state representative in his district. Because he could not write in the name of a candidate he preferred, he had no way to cast a meaningful vote. Petitioner's dilemma is a recurring, frequent phenomenon in Hawaii because of the State's ballot access rules and the circumstance that one party, the Democratic Party, is predominant. It is critical to understand that petitioner's case is not an isolated example of a restriction on the free choice of candidates. The very ballot access rules the Court cites as mitigating his injury in fact compound it system wide.

Democratic candidates often run unopposed, especially in state legislative races. In the 1986 general election, 33 percent of the elections for state legislative offices involved single candidate races. Reply Brief for Petitioner 2-3, n. 2. The comparable figures for 1984 and 1982 were 39 percent and 37.5 percent. *Ibid.* Large numbers of voters cast 1443 blank ballots in uncontested races, that is, they leave the ballots blank

rather than vote for the single candidate listed. In 1990, 27 percent of voters who voted in other races did not cast votes in uncontested state Senate races. Brief for Common Cause/Hawaii as *Amicus Curiae* 15-16. Twenty-nine percent of voters did not cast votes in uncontested state House races. *Id.* at 16. Even in contested races in 1990, 12 to 13 percent of voters cast blank ballots. *Id.* at 16-17.

Given that so many Hawaii voters are dissatisfied with the choices available to them, it is hard to avoid the conclusion that at least some voters would cast write-in votes for other candidates if given this option. The write-in ban thus prevents these voters from participating in Hawaii elections in a meaningful manner.

This evidence also belies the majority's suggestion that Hawaii voters are presented with adequate electoral choices because Hawaii makes it easy to get on the official ballot. To the contrary, Hawaii's ballot access laws taken as a whole impose a significant impediment to third-party or independent candidacies. The majority suggests that it is easy for new parties to petition for a place on the primary ballot because they must obtain the signatures of only one percent of the State's registered voters. This ignores the difficulty presented by the early deadline for gathering these signatures: 150 days (5 months) before the primary election. Meeting this deadline requires considerable organization at an early stage in the election, a condition difficult for many small parties to meet. See Brief for Socialist Workers Party as *Amicus Curiae* 10-11, n. 4.

If the party petition is unsuccessful or not completed in time, or if a candidate does not wish to be affiliated with a party, he may run as an independent. While the requirements to get on the nonpartisan ballot are not onerous (15 to 25 signatures, 60 days before the primary), the non-partisan ballot presents voters with a difficult choice. This is because each primary voter can choose only a single ballot 1441 for all offices. Hence, a

voter who wishes to vote for an independent candidate for one office must forgo the opportunity to vote in an established party primary in every other race. Since there might be no independent candidates for most of the other offices, in practical terms the voter who wants to vote for one independent candidate forfeits the right to participate in the selection of candidates for all other offices. This rule, the very ballot access rule that the Court finds to be curative, in fact presents a substantial disincentive for voters to select the nonpartisan ballot. A voter who wishes to vote for a third-party candidate for only one particular office faces a similar disincentive to select the third party's ballot.

The dominance of the Democratic Party magnifies the disincentive because the primary election is dispositive in so many races. In effect, a Hawaii voter who wishes to vote for any independent candidate must choose between doing so and participating in what will be the dispositive election for many offices. This dilemma imposes a substantial burden on voter choice. It explains also why so few independent candidates secure enough primary votes to advance to the general election. As the majority notes, only eight independent candidates have succeeded in advancing to the general election in the past 10 years. That is, less than one independent candidate per year on average has in fact run in a general election in Hawaii.

The majority's approval of Hawaii's ban is ironic at a time when the new democracies in foreign countries strive to emerge from an era of sham elections in which the name of the ruling party candidate was the only one on the ballot. Hawaii does not impose as severe a restriction on the right to vote, but it imposes a restriction that has a haunting similarity in its tendency to exact severe penalties for one who does anything but vote the dominant party ballot.

Aside from constraints related to ballot access restrictions, the write-in ban limits voter choice in another way. Write-in⁴⁴⁵ vot-

ing can serve as an important safety mechanism in those instances where a late-developing issue arises or where new information is disclosed about a candidate late in the race. In these situations, voters may become disenchanted with the available candidates when it is too late for other candidates to come forward and qualify for the ballot. The prohibition on write-in voting imposes a significant burden on voters, forcing them either to vote for a candidate whom they no longer support or to cast a blank ballot. Write-in voting provides a way out of the quandary, allowing voters to switch their support to candidates who are not on the official ballot. Even if there are other mechanisms to address the problem of late-breaking election developments (unsuitable candidates who win an election can be recalled), allowing write-in voting is the only way to preserve the voters' right to cast a meaningful vote in the general election.

With this background, I turn to the legal principles that control this case. At the outset, I agree with the first premise in the majority's legal analysis. The right at stake here is the right to cast a meaningful vote for the candidate of one's choice. Petitioner's right to freedom of expression is not implicated. His argument that the First Amendment confers upon citizens the right to cast a protest vote and to have government officials count and report this vote is not persuasive. As the majority points out, the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression.

I agree as well with the careful statement the Court gives of the test to be applied in this case to determine if the right to vote has been constricted. As the Court phrases it, we must "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into con-

sideration 'the extent to which those interests make it necessary⁴⁴⁶ to burden the plaintiff's rights.' " *Ante*, at 2063, quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-214, 107 S.Ct. 544, 547-548, 93 L.Ed.2d 514 (1986). I submit the conclusion must be that the write-in ban deprives some voters of any substantial voice in selecting candidates for the entire range of offices at issue in a particular election.

As a starting point, it is useful to remember that until the late 1800's, all ballots cast in this country were write-in ballots. The system of state-prepared ballots, also known as the Australian ballot system, was introduced in this country in 1888. See L.E. Fredman, *The Australian Ballot: The Story of an American Reform* ix (1968). Prior to this, voters prepared their own ballots or used preprinted tickets offered by political parties. Since there were no state-imposed restrictions on whose name could appear on a ballot, individuals could always vote for the candidates of their choice.

State-prepared ballots were considered to be a progressive reform to reduce fraudulent election practices. The pre-printed ballots offered by political parties had often been in distinctive colors so that the party could determine whether one who had sold his vote had used the right ballot. *Id.*, at 22. The disadvantage of the new ballot system was that it could operate to constrict voter choice. In recognition of this problem, several early state courts recognized a right to cast write-in votes. See, e.g., *Sanner v. Patton*, 155 Ill. 553, 562-564, 40 N.E. 290, 292-293 (1895) ("[I]f the construction contended for by appellee [prohibiting write-in voting] be the correct one, the voter is deprived of the constitutional right of suffrage; he is deprived of the right of exercising his own choice; and where this right is taken away there is nothing left worthy of the name of the right of suffrage—the boasted free ballot becomes a delusion"); *Patterson v. Hanley*, 136 Cal. 265, 270, 68 P. 821, 823 (1902) ("Under every form of ballot of which we have

had any experience the voter has been allowed—and it seems to be agreed that he must be allowed—the privilege of casting his vote for any person for any office by writing his name in the proper place"); and *Oughton v. Black*, 212 Pa. 1, 6-7, 61 A. 346, 348 (1905) ("Unless there was such provision to enable the voter, not satisfied to vote any ticket on the ballot, or for any names appearing on it, to make up an entire ticket of his own choice, the election as to him would not be equal, for he would not be able to express his own individual will in his own way").

As these courts recognized, some voters cannot vote for the candidate of their choice without a write-in option. In effect, a write-in ban, in conjunction with other restrictions, can deprive the voter of the opportunity to cast a meaningful ballot. As a consequence, write-in prohibitions can impose a significant burden on voting rights. See *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government"). For those who are affected by write-in bans, the infringement on their right to vote for the candidate of their choice is total. The fact that write-in candidates are longshots more often than not makes no difference; the right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful. *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983, 987 (S.D. Ohio) ("A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise. The use of write-in ballots does not and should not be dependent on the candidate's chance of success"), *aff'd in part, modified in part, sub nom. Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

Based on the foregoing reasoning, I cannot accept the majority's presumption that write-in bans are permissible if the State's ballot

access laws are otherwise constitutional. The presumption is circular, for it fails to take into account that we must consider the availability of write-in voting, or the lack thereof, as a factor in determining whether a State's ballot access laws considered as a whole are constitutional. *Jenness v. Fortson*, 403 U.S. 431, 438, 91 S.Ct. 1970, 1974, 29 L.Ed.2d 554 (1971); *Storer v. Brown*, 415 U.S. 724, 736, n. 7, 94 S.Ct. 1274, 1282, n. 7, 39 L.Ed.2d 714 (1974). The effect of the presumption, moreover, is to excuse a State from having to justify or defend any write-in ban. Under the majority's view, a write-in ban only has constitutional implications when the State's ballot access scheme is defective and write-in voting would remedy the defect. This means that the State needs to defend only its ballot access laws, and not the write-in restriction itself.

The majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon some individual voters by preventing them from exercising their right to vote in a meaningful manner. The liberality of a State's ballot access laws is one determinant of the extent of the burden imposed by the write-in ban; it is not, though, an automatic excuse for forbidding all write-in voting. In my view, a State that bans write-in voting in some or all elections must justify the burden on individual voters by putting forth the precise interests that are served by the ban. A write-in prohibition should not be presumed valid in the absence of any proffered justification by the State. The standard the Court derives from *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), means at least this.

Because Hawaii's write-in ban, when considered in conjunction with the State's ballot access laws, imposes a significant burden on voters such as petitioner, it must put forward the state interests which justify the burden so that we can assess them. I do not think it necessary here to specify the level of scrutiny that should then be applied because, in my view, the State has failed to justify the write-in ban under any level of scrutiny.

The interests proffered by the State, some of which are puzzling, are not advanced to any significant degree by the write-in prohibition. I consider each of the interests in turn.

The interest that has the best potential for acceptance, in my view, is that of preserving the integrity of party primaries⁴⁴⁹ by preventing sore loser candidacies during the general election. As the majority points out, we have acknowledged the State's interest in avoiding party factionalism. A write-in ban does serve this interest to some degree by eliminating one mechanism which could be used by sore loser candidates. But I do not agree that this interest provides "adequate justification" for the ban. *Ante*, at 2066. As an initial matter, the interest can at best justify the write-in prohibition for general elections; it cannot justify Hawaii's complete ban in both the primary and the general election. And with respect to general elections, a write-in ban is a very overinclusive means of addressing the problem; it bars legitimate candidacies as well as undesirable sore loser candidacies. If the State desires to prevent sore loser candidacies, it can implement a narrow provision aimed at that particular problem.

The second interest advanced by the State is enforcing its policy of permitting the unopposed victors in certain primaries to be designated as officeholders without having to go through the general election. The majority states that "[t]his would not be possible, absent the write-in voting ban." *Ibid*. This makes no sense. As petitioner's counsel acknowledged during oral argument, "[t]o the degree that Hawaii has abolished general elections in these circumstances, there is no occasion to cast a write-in ballot." Tr. of Oral Arg. 14. If anything, the argument cuts the other way because this provision makes it all the more important to allow write-in voting in the primary elections because primaries are often dispositive.

Hawaii justifies its write-in ban in primary elections as a way to prevent party raiding.

Petitioner argues that this alleged interest is suspect because the State created the party-raiding problem in the first place by allowing open primaries. I agree. It is ironic for the State to raise this concern when the risk of party-raiding is a feature of the open primary system the State has chosen. The majority ¹⁴⁵⁰suggests that write-in voting presents a particular risk of circumventing the primary system because state law requires candidates in party primaries to be members of the party. Again, the majority's argument is not persuasive. If write-in voters mount a campaign for a candidate who does not meet state-law requirements, the candidate would be disqualified from the election.

The State also cites its interest in promoting the informed selection of candidates, an interest it claims is advanced by "flushing candidates into the open a reasonable time before the election." Brief for Respondents 44. I think the State has it backwards. The fact that write-in candidates often do not conduct visible campaigns seems to me to make it more likely that voters who go to the trouble of seeking out these candidates and writing in their names are well informed. The state interest may well cut the other way.

The State cites interests in combating fraud and enforcing nomination requirements. But the State does not explain how write-in voting presents a risk of fraud in today's polling places. As to the State's interest in making sure that ineligible candidates are not elected, petitioner's counsel pointed out at argument that approximately 20 States require write-in candidates to file a declaration of candidacy and verify that they are eligible to hold office a few days before the election. Tr. of Oral Arg. 13.

In sum, the State's proffered justifications for the write-in prohibition are not sufficient under any standard to justify the significant impairment of the constitutional rights of

voters such as petitioner. I would grant him relief.



504 U.S. 451, 119 L.Ed.2d 265

¹⁴⁵¹EASTMAN KODAK COMPANY,
Petitioner

v.

IMAGE TECHNICAL SERVICES,
INC., et al.

No. 90-1029.

Argued Dec. 10, 1991.

Decided June 8, 1992.

Independent service organizations (ISOs) brought antitrust action against manufacturer to recover for its policies limiting availability to ISOs of replacement parts for its equipment, and making it more difficult for ISOs to compete with it in servicing such equipment. The United States District Court for the Northern District of California, William W. Schwarzer, J., entered summary judgment for manufacturer. ISOs appealed. The United States Court of Appeals for the Ninth Circuit, 903 F.2d 612, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Blackmun, held that: (1) issue remained as to whether manufacturer unlawfully tied sale of service for its machine to sale of parts; (2) manufacturer was not entitled to legal presumption that it lacked market power; and (3) issue remained as to whether manufacturer possessed monopoly power.

Court of Appeals affirmed.

Justice Scalia issued dissenting opinion in which Justices O'Connor and Thomas joined.

479 U.S. 208, 93 L.Ed.2d 514

^{120a}Julia H. TASHJIAN, Secretary of
State of Connecticut, Appellant

v.

REPUBLICAN PARTY OF
CONNECTICUT et al.

No. 85-766.

Argued Oct. 8, 1986.

Decided Dec. 10, 1986.

Political party, state chairman of party, and party's federal officeholders brought action challenging validity of Connecticut's closed primary law. The United States District Court, District of Connecticut, José A. Cabranes, J., 599 F.Supp. 1228, granted plaintiffs' motion for summary judgment, and state appealed. The Court of Appeals, 770 F.2d 265, affirmed, and state petitioned for certiorari. The Supreme Court, Justice Marshall, held that: (1) Connecticut closed primary statute impermissibly interfered with political party's First Amendment right to define its associational boundaries, and (2) party rule that permitted unaffiliated voters to participate in primary elections did not violate Qualifications Clause or Seventeenth Amendment.

Affirmed.

Justice Stevens dissented and filed opinion, in which Justice Scalia joined.

Justice Scalia dissented and filed opinion, in which Chief Justice Rehnquist and Justice O'Connor joined.

1. Constitutional Law ⇐91, 274.1(2)

Freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. U.S. C.A. Const.Amends. 1, 14.

2. Constitutional Law ⇐82(8)

Political organization has constitutional right to protect privacy of its membership rolls, where members affiliation with organization might subject members to

public hostility or discrimination. U.S.C.A. Const.Amends. 1, 14.

3. Constitutional Law ⇐91 Elections ⇐21

Connecticut closed primary statute impermissibly interfered with political party's First Amendment right to define its associational boundaries, though unaffiliated voters could register as members of party as late as noon of last business day preceding primary. C.G.S.A. § 9-431; U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐91 Elections ⇐3

Power to regulate time, place and manner of elections does not justify, without more, abridgement of fundamental rights such as right to vote or to enter into political associations. U.S.C.A. Const.Amend. 1.

5. Elections ⇐21

State of Connecticut's interest in economic administrative of election system was not sufficient basis for statute mandating closed primaries, where political party wished to open its primary elections to unaffiliated voters. C.G.S.A. § 9-431; U.S.C.A. Const.Amend. 1.

6. Elections ⇐21

State of Connecticut's interest in preventing raiding was not sufficient basis for statute mandating closed primaries, where political party wished to open its primary elections only to unaffiliated voters and not to members of other political parties, and election statute provided that unaffiliated voter could register as party member as late as noon on last business day preceding primary. C.G.S.A. §§ 9-56, 9-431; U.S. C.A. Const.Amend. 1.

7. Elections ⇐21

State of Connecticut's interest in avoiding voter confusion was insufficient basis for statute mandating closed primaries, where political party had elected to open its primaries to unaffiliated voters. C.G.S.A. § 9-431; U.S.C.A. Const.Amend. 1.

8. Constitutional Law ¶91

Neither state nor court may constitutionally substitute its judgment for that of political party as to boundaries of its own association and structure that best allows it to pursue its political goals. U.S.C.A. Const. Amend. 1.

9. Elections ¶126(4)

Qualifications Clauses are applicable to primary elections in precisely same fashion that they apply to general congressional elections. U.S.C.A. Const. Art. 1, § 2, cl. 1; Amend. 17.

10. Elections ¶60

Qualifications Clauses require only that all those qualified to participate in selection of members of most numerous branch of state legislature be qualified to participate in federal legislative elections. U.S.C.A. Const. Art. 1, § 2, cl. 1; Amend. 17.

11. Elections ¶60

Qualifications Clauses do not require perfect symmetry of voter qualifications in state and federal legislative elections. U.S.C.A. Const. Art. 1, § 2, cl. 1; Amend. 17.

12. Elections ¶126(4)

Party rule opening political party's primary elections to unaffiliated voters did not violate Qualifications Clauses or Seventeenth Amendment, where rule did not disenfranchise any voter in federal election who was qualified to vote in primary or general election for most numerous branch of state legislature. U.S.C.A. Const. Art. 1, § 2, cl. 1; Amend. 17.

Syllabus *

A Connecticut statute (§ 9-431), enacted in 1955, requires voters in any political party primary to be registered members of that party. In 1984, appellee Republican Party of Connecticut (Party) adopted a Party rule that permits independent voters—registered voters not affiliated with any party—to vote in Republican primaries for

federal and statewide offices. The Party and the Party's federal officeholders and state chairman (also appellees) brought an action in Federal District Court challenging the constitutionality of § 9-431 on the ground that it deprives the Party of its right under the First and Fourteenth Amendments to enter into political association with individuals of its own choosing, and seeking declaratory and injunctive relief. The District Court granted summary judgment in appellees' favor, and the Court of Appeals affirmed.

Held:

1. Section 9-431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments. Pp. 548-554.

(a) The freedom of association protected by those Amendments includes partisan political organization. Section 9-431 places limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community. The fact that the State has the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote or, as here, the freedom of political association. Pp. 548-550.

(b) The interests asserted by appellant Secretary of State of Connecticut as justification for the statute—that it ensures the administrability of the primary, prevents voter raiding, avoids voter confusion, and protects the integrity of the two-party system and the responsibility of party government—are insubstantial. The possibility of increases in the cost of administering the election system is not a sufficient basis for infringing appellees' First Amend-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

ment rights. The interest in curtailing raiding is not implicated, since § 9-431 does not impede a raid on the Republican Party by independent voters; independent raiders need only register as Republicans and vote in the primary. The interest in preventing voter confusion does not make it necessary to burden the Party's associational rights. And even if the State were correct in arguing that § 9-431 in providing for a closed primary system is designed to save the Party from undertaking conduct destructive of its own interests, the State may not constitutionally substitute its judgment for that of the Party, whose determination of the boundaries of its own association and of the structure that best allows it to pursue its political goals is protected by the Constitution. Pp. 550-554.

2. The implementation of the Party rule will not violate the Qualifications Clause of the Constitution—which provides that the House of Representatives “shall be composed of Members chosen . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”—and the parallel provision of the Seventeenth Amendment, because it does not disenfranchise any voter in a federal election who was qualified to vote in a primary or general election for the more numerous house of the state legislature. The Clause and the Amendment are not violated by the fact that the Party rule establishes qualifications for voting in congressional elections that differ from the qualifications in elections for the state legislature. Where state law, as here, has made the primary an integral part of the election procedure, the requirements of the Clause and the Amendment apply to primaries as well as to general elections. The achievement of the goal of the Clause to prevent the mischief that would arise if state voters found themselves disqualified from participating in federal elections does not require that

qualifications for exercise of the federal franchise be precisely equivalent to the qualifications for exercising the franchise in a given State. Pp. 554-556.

770 F.2d 265 (CA2 1985), affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 557. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and O’CONNOR, J., joined, *post*, p. 559.

¹²⁰Elliot F. Gerson, Hartford, Conn., for appellant.

David S. Golub, Stamford, Conn., for appellees.

Stephen E. Gottlieb, Albany, for James McGregor Burns.

Justice MARSHALL delivered the opinion of the Court.

Appellee Republican Party of the State of Connecticut (Party) in 1984 adopted a Party rule which permits independent voters—registered voters not affiliated with any political party—to vote in Republican primaries for federal and state-wide offices. Appellant Julia Tashjian, the Secretary of the State of Connecticut, is charged with the administration of the State’s election statutes, which include a provision requiring voters in any party primary to be registered members²¹¹ of that party. Conn.Gen.Stat. § 9-431 (1985).¹ Appellees, who in addition to the Party include the Party’s federal officeholders and the Party’s state chairman, challenged this eligibility provision on the ground that it deprives the Party of its First Amendment right to enter into political association with individuals of its own choosing. The District Court granted summary judgment in favor of appellees. 599 F.Supp. 1228 (Conn. 1984). The Court of Appeals affirmed.

1. The statute provides in pertinent part: “No person shall be permitted to vote at a primary of a party unless he is on the last-completed

enrollment list of such party in the municipality or voting district. . . .”

479 U.S. 213

Cite as 107 S.Ct. 544 (1986)

770 F.2d 265 (CA2 1985). We noted probable jurisdiction, 474 U.S. 1049, 106 S.Ct. 783, 88 L.Ed.2d 762 (1986), and now affirm.

I

In 1955, Connecticut adopted its present primary election system. For major parties,² the process of candidate selection for federal and statewide offices requires a statewide convention of party delegates; district conventions are held to select candidates for seats in the state legislature. The party convention may certify as the party-endorsed candidate any person receiving more than 20% of the votes cast in a roll-call vote at the convention. Any candidate not endorsed by the party who received 20% of the vote may challenge the party-endorsed candidate in a primary election, in which the candidate receiving the plurality of votes becomes the party's nominee. Conn.Gen.Stat. §§ 9-382, 9-400, 9-444 (1985). Candidates selected by the major parties, whether through convention or primary, are automatically accorded a place on the ballot at the general election. 1212§ 9-379. The costs of primary elections are paid out of public funds. See, e.g., § 9-441.

The statute challenged in these proceedings, § 9-431, has remained substantially unchanged since the adoption of the State's primary system. In 1976, the statute's constitutionality was upheld by a three-judge District Court against a challenge by an independent voter who sought a declaration of his right to vote in the Republican primary. *Nader v. Schaffer*, 417 F.Supp. 837 (Conn.), summarily aff'd, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976). In that

action, the Party opposed the plaintiff's efforts to participate in the Party primary.

Subsequent to the decision in *Nader*, however, the Party changed its views with respect to participation by independent voters in Party primaries. Motivated in part by the demographic importance of independent voters in Connecticut politics,³ in September 1983 the Party's Central Committee recommended calling a state convention to consider altering the Party's rules to allow independents to vote in Party primaries. In January 1984 the state convention adopted the Party rule now at issue, which provides:

"Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer." App. 20.

During the 1984 session, the Republican leadership in the state legislature, in response to the conflict between the newly enacted Party rule and § 9-431, proposed to amend the statute to allow independents to vote in primaries when permitted by Party rules. The proposed legislation was defeated,⁴ substantially along party lines, in both houses of the legislature, which at that time were controlled by the Democratic Party.⁴

The Party and the individual appellees then commenced this action in the District Court, seeking a declaration that § 9-431 infringes appellees' right to freedom of as-

2. A "major party" is defined as "a political party or organization whose candidate for governor at the last preceding election for governor received ... at least twenty per cent of the whole number of votes cast for all candidates for governor." Conn.Gen.Stat. § 9-372(5)(B) (1985). The Democratic and Republican parties are the only major parties in the State under this definition.

3. The record shows that in October 1983 there were 659,268 registered Democrats, 425,695 reg-

istered Republicans, and 532,723 registered and unaffiliated voters in Connecticut. 2 App. to Juris.Statement 244.

4. In the November 1984 elections, the Republicans acquired a majority of seats in both houses of the state legislature, and an amendment to § 9-431 was passed, but was vetoed by the Democratic Governor.

association for the advancement of common political objectives guaranteed by the First and Fourteenth Amendments, and injunctive relief against its further enforcement. After discovery, the parties submitted extensive stipulations of fact to the District Court, which granted summary judgment for appellees. The District Court concluded that "[a]ny effort by the state to substitute its judgment for that of the party on ... the question of who is and is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process ... substantially impinges on First Amendment rights." 599 F.Supp., at 1238. Rejecting the state interests proffered by appellant to justify the statute, the District Court held that "as applied to the Republican Party rule permitting unaffiliated voters to participate in certain Republican Party primaries, the statute abridges the right of association guaranteed by the First Amendment." *Id.*, at 1241.

The Court of Appeals affirmed, holding that § 9-431 "substantially interferes with the Republican Party's first amendment right to define its associational boundaries, determine the content of its message, and engage in effective political association." 770 F.2d, at 283.

II

We begin from the recognition that "[c]onstitutional challenges to specific provisions of a State's election laws ... cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974)). "Instead, a court ... must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward

by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S., at 789, 103 S.Ct., at 1570.

[1] The nature of appellees' First Amendment interest is evident. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958); see *NAACP v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *Bates v. Little Rock*, 361 U.S. 516, 522-523, 80 S.Ct. 412, 416-417, 4 L.Ed.2d 480 (1960). The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. *Elrod v. Burns*, 427 U.S. 347, 357, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973).

The Party here contends that § 9-431 impermissibly burdens the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success. The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association. As we have said, the freedom to join together in furtherance of common political beliefs "necessarily presupposes the freedom to identify the people who

479 U.S. 216

Cite as 107 S.Ct. 544 (1986)

constitute the association." *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981).

[2] A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.⁵

[3] Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the

Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals. As we have said, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Democratic Party, supra*, at 122, 101 S.Ct., at 1019 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212, 1 L.Ed.2d 1811 (1957)).⁶ The statute here places limits upon the group of 1216 registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. *Kusper v. Pontikes, supra*, 414 U.S., at 58, 94 S.Ct., at 308. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.⁷

5. Indeed, acts of public affiliation may subject the members of political organizations to public hostility or discrimination; under those circumstances an association has a constitutional right to protect the privacy of its membership rolls. *Bates v. Little Rock*, 361 U.S. 516, 523-524, 80 S.Ct. 412, 416-417, 4 L.Ed.2d 480 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958).

6. It is this element of potential interference with the rights of the Party's members which distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. In this latter class of cases, the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. See *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); *Nader v. Schaffer*, 417 F.Supp. 837 (Conn.), summarily aff'd, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976). Similarly, the Court has upheld the right of national political parties to refuse to seat at their conventions delegates chosen in state selection processes which did not conform to party rules. See *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S.

107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975). These situations are analytically distinct from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers. Under these circumstances, there is no conflict between the associational interests of members and nonmembers. See generally Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L.J. 117 (1984).

7. Appellant contends that any infringement of the associational right of the Party or its members is *de minimis*, because Connecticut law, as amended during the pendency of this litigation, provides that any previously unaffiliated voter may become eligible to vote in the Party's primary by enrolling as a Party member as late as noon on the last business day preceding the primary. Conn.Gen.Stat. § 9-56 (1985). Thus, appellant contends, any independent voter wishing to participate in any Party primary may do so.

This is not a satisfactory response to the Party's contentions for two reasons. First, as the Court of Appeals noted, the formal affiliation process is one which individual voters may employ in order to associate with the Party, but it

[4] ¹²¹⁷It is, of course, fundamental to appellant's defense of the State's statute that this impingement upon the associational rights of the Party and its members occurs at the ballot box, for the Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, see *Wesberry v. Sanders*, 376 U.S. 1, 6-7, 84 S.Ct. 526, 529-530, 11 L.Ed.2d 481 (1964), or, as here, the freedom of political association. We turn then to an examination of the interests which appellant asserts to justify the burden cast by the statute upon the associational rights of the Party and its members.

III

Appellant contends that § 9-431 is a narrowly tailored regulation which advances the State's compelling interests by ensuring the administrability of the primary system, preventing raiding, avoiding voter con-

fusion, and protecting the responsibility of party government.

provides no means by which the members of the Party may choose to broaden opportunities for joining the association by their own act, without any intervening action by potential voters. 770 F.2d, at 281, n. 24. Second, and more importantly, the requirement of public affiliation with the Party in order to vote in the primary conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the State requires regardless of the actual beliefs of the individual voter. Cf. *Wooley v. Maynard*, 430 U.S. 705, 714-715, 97 S.Ct. 1428, 1435-1436, 51 L.Ed.2d 752 (1977); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 633-634, 63 S.Ct. 1178-1183, 87 L.Ed. 1628 (1943). As counsel for appellees conceded at oral argument, a requirement that independent voters merely notify state authorities of their intention to vote in the Party primary would be acceptable as an

A

[5] Although it was not presented to the Court of Appeals as a basis for the defense of the statute, appellant argues here that the administrative burden imposed by the Party rule is a sufficient ground on which to uphold the constitutionality of ¹²¹⁸§ 9-431.⁸ Appellant contends that the Party's rule would require the purchase of additional voting machines, the training of additional poll workers, and potentially the printing of additional ballot materials specifically intended for independents voting in the Republican primary. In essence, appellant claims that the administration of the system contemplated by the Party rule would simply cost the State too much.

Even assuming the factual accuracy of these contentions, which have not been subjected to any scrutiny by the District Court, the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights. Costs of administration would likewise increase if a third major party should come into existence in Connecticut, thus requiring the State to fund a third major-party primary.

administrative measure, but "[t]he problem is that the State is insisting on a public act of affiliation . . . joining the Republican Party as a condition of this association." Tr. of Oral Arg. 40.

8. The District Court entered no findings of fact as to the potential administrative changes necessary to implement the Party rule. As appellant conceded at oral argument, the only evidence in the record before the District Court relating to the administration of the rule was a statement by the State's election attorney in testimony before the legislature that the system would be "workable." *Id.*, at 20. Appellant relies here upon affidavits concerning potential administrative burden which were submitted to the Court of Appeals in support of appellant's request for a stay, entered after this Court noted probable jurisdiction.

479 U.S. 220

Cite as 107 S.Ct. 544 (1986)

Additional voting machines, poll workers, and ballot materials would all be necessary under these circumstances as well. But the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford. Cf. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.

1219B

[6] Appellant argues that § 9-431 is justified as a measure to prevent raiding, a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760, 93 S.Ct. 1245, 1251, 36 L.Ed.2d 1 (1973). While we have recognized that "a State may have a legitimate interest in seeking to curtail 'raiding,' since that practice may affect the integrity of the electoral process," *Kusper v. Pontikes*, 414 U.S., at 59-60, 94 S.Ct., at 308-309; *Rosario v. Rockefeller*, *supra*, 410 U.S., at 761, 93 S.Ct., at 1251; that interest is not implicated here.⁹ The statute as applied to the Party's rule prevents independents, who otherwise cannot vote in any primary, from participating in the Republican primary.

9. As we have previously noted, a study commission established by the national Democratic Party concluded that "the existence of 'raiding' has never been conclusively proven by survey research." *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S., at 122-123, n. 23, 101 S.Ct., at 1019-1020, n. 23 (quoting Openness, Participation and Party Building:

Yet a raid on the Republican Party primary by independent voters, a curious concept only distantly related to the type of raiding discussed in *Kusper* and *Rosario*, is not impeded by § 9-431; the independent raiders need only register as Republicans and vote in the primary. Indeed, under Conn. Gen.Stat. § 9-56 (1985), which permits an independent to affiliate with the Party as late as noon on the business day preceding the primary, see n. 7, *supra*, the State's election statutes actually assist a "raid" by independents, which could be organized and implemented at the 11th hour. The State's asserted interest in the prevention of raiding provides no justification for the statute challenged here.

1220C

[7] Appellant's next argument in support of § 9-431 is that the closed primary system avoids voter confusion. Appellant contends that "[t]he legislature could properly find that it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name." Brief for Appellant 59. Appellees respond that the State is attempting to act as the ideological guarantor of the Republican Party's candidates, ensuring that voters are not misled by a "Republican" candidate who professes something other than what the State regards as true Republican principles. Brief for Appellees 28.

As we have said, "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson v. Celebrezze*, 460

Reforms for a Stronger Democratic Party 68 (Feb. 17, 1978)). In view of our conclusion that § 9-431 is irrelevant to the question of raiding, we express no opinion as to whether the continuing difficulty of proving that raiding is possible attenuates the asserted state interest in preventing the practice.

U.S., at 796, 103 S.Ct., at 1574. To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise. Appellant's argument depends upon the belief that voters can be "misled" by party labels. But "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Id.*, at 797, 103 S.Ct., at 1574. Moreover, appellant's concern that candidates selected under the Party rule will be the nominees of an "amorphous" group using the Party's name is inconsistent with the facts. The Party is not proposing that independents be allowed to choose the Party's nominee without Party participation; on the contrary, to be listed on the Party's primary ballot continues to require, under a statute not challenged here, that the primary candidate have obtained at least 20% of the vote at a Party convention, which only Party ¹²¹members may attend. Conn.Gen. Stat. § 9-400 (1985). If no such candidate seeks to challenge the convention's nominee in a primary, then no primary is held, and the convention nominee becomes the Party's nominee in the general election without any intervention by independent voters.¹⁰ Even assuming, however, that putative candidates defeated at the Party convention will have an increased incentive under the Party's rule to make primary challenges, hoping to attract more substantial support from independents than from Party delegates, the requirement that such challengers garner substantial minority support at the convention greatly attenuates the State's concern that the ultimate nominee will be wedded to the Party in nothing more than a marriage of convenience.

In arguing that the Party rule interferes with educated decisions by voters, appel-

lant also disregards the substantial benefit which the Party rule provides to the Party and its members in seeking to choose successful candidates. Given the numerical strength of independent voters in the State, one of the questions most likely to occur to Connecticut Republicans in selecting candidates for public office is how can the Party most effectively appeal to the independent voter? By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors. "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson v. Celebrezze, supra*, at 798, 103 S.Ct., at 1575. The State's legitimate interests in preventing voter confusion ¹²²and providing for educated and responsible voter decisions in no respect "make it necessary to burden the [Party's] rights." 460 U.S., at 789, 103 S.Ct., at 1570.

D

Finally, appellant contends that § 9-431 furthers the State's compelling interest in protecting the integrity of the two-party system and the responsibility of party government. Appellant argues vigorously and at length that the closed primary system chosen by the state legislature promotes responsiveness by elected officials and strengthens the effectiveness of the political parties.

The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this cen-

that are the result of primary contests.

10. The record does not disclose the proportion of Connecticut Republican Party nominations

tury, and no consensus has as yet emerged.¹¹ Appellant *Jazz* invokes a long and distinguished line of political scientists and public officials who have been supporters of the closed primary. But our role is not to decide whether the state legislature was acting wisely in enacting the closed primary system in 1955, or whether the Republican Party makes a mistake in seeking to depart from the practice of the past 30 years.¹²

We have previously recognized the danger that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer v. Brown*, 415 U.S., at 736, 94 S.Ct., at 1282. We upheld a California statute which denied access to the ballot to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediately preceding primary election. We said:

11. At the present time, 21 States provide for "closed" primaries of the classic sort, in which the primary voter must be registered as a member of the party for some period of time prior to the holding of the primary election. See *Ariz. Rev.Stat. Ann.* § 16-467 (1984); *Cal.Elec.Code Ann.* § 501 (West Supp.1986); *Colo.Rev.Stat.* § 1-2-203 (Supp.1986); *Conn.Gen.Stat.* § 9-431 (1985); *Del.Code Ann.*, Tit. 15, § 3161 (1981); *Fla.Stat.* § 101.021 (1985); *Kan.Stat. Ann.* § 25-3301 (1981); *Ky.Rev.Stat.* §§ 116.045, 116.055 (1982); *Me.Rev.Stat. Ann.*, Tit. 21-A, § 141 *et seq.* (Supp.1986-1987); *Md. Ann.Code*, Art. 33, § 3-8 *et seq.* (1985); *Neb.Rev.Stat.* § 32-530 (1984); *Nev.Rev.Stat.* § 293.287 (1985); *N.M. Stat. Ann.* § 1-4-16 (1985); *N.Y.Elec.Law* § 1-104.9 (McKinney 1978); *N.C.Gen.Stat.* § 163.74 (1982 and Supp.1985); *Okla.Stat.*, Tit. 26, § 1-104 (1976); *Ore.Rev.Stat.* § 247.201 (1985); *Pa. Stat. Ann.*, Tit. 25, § 2832 (Purdon 1963); *S.D. Codified Laws* § 12-4-15 (1982); *W.Va.Code* § 3-1-35 (1979); *Wyo.Stat.* § 22-5-212 (1977). Sixteen States allow a voter previously unaffiliated with any party to vote in a party primary if he affiliates with the party at the time of, or for the purpose of, voting in the primary. See *Ala.Code* § 17-16-14(b) (1985); *Ark.Stat. Ann.* § 7-126 (1976); *Ga.Code Ann.* § 21-2-235 (1982); *Ill.Rev.Stat.*, ch. 46, § 7-43(a) (1986); *Ind.Code* § 3-10-1-6 (Supp.1986); *Iowa Code* §§ 43.41, 43.42 (1985); *Mass.Gen.Laws* § 53:37 (1984); *Miss.Code Ann.* § 23-15-575 (1986 pamphlet); *Mo.Rev.Stat.* § 115.397 (1978); *N.H.Rev.*

"[T]he one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late *Jazz* rather than an early decision to seek independent ballot status." *Ibid.*

The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened by raiding in *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in *Storer*

Stat. Ann. § 654:34II (1986); *N.J.Stat. Ann.* § 19:23-45 (West Supp.1986); *Ohio Rev.Code Ann.* § 3513.19 (Supp.1985); *R.I.Gen.Laws* § 17-9-26(c) (1981); *S.C.Code* §§ 7-5-120, 7-9-20 (1976 and Supp.1985); *Tenn.Code Ann.* § 2-7-115(b)(2) (1985); *Tex.Elec.Code Ann.* § 162.003 (1986). Four States provide for non-partisan primaries in which all registered voters may participate, *Alaska Stat. Ann.* §§ 15.05.010, 15.25.090 (1982); *La.Rev.Stat. Ann.* §§ 18:401B, 18:521B (West 1979 and Supp.1986); *Va.Code* § 24.1-182 (1985); *Wash.Rev.Code* § 29.18.200 (1965), while nine States have adopted classical "open" primaries, in which all registered voters may choose in which party primary to vote. *Haw.Rev.Stat.* § 12-31 (Supp.1984); *Idaho Code* §§ 34-402, 34-404, 34-904 (Supp.1986); *Mich. Comp.Laws* §§ 168.575, 168.576 (1967 and Supp.1986); *Minn.Stat.* § 204D.08(4) (1985); *Mont.Code Ann.* § 13-10-301(2) (1985); *N.D. Cent.Code* § 16.1-11-22 (Supp.1985); *Utah Code Ann.* § 20-3-19(2) (Supp.1986); *Vt.Stat. Ann.*, Tit. 17, § 2363 (1982); *Wis.Stat.* §§ 5.37, 6.80 (1983-1984).

12. We note that appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 States which have chosen to permit more substantial openness in their primary systems than Connecticut has permitted heretofore.

and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

[8] Under these circumstances, the views of the State, which to some extent represent the views of the one political party transiently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force. The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point "even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S., at 123-124, 101 S.Ct., at 1019-1020 (footnote omitted). The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground

that they view a particular expression as unwise or irrational." *Id.*, at 124, 101 S.Ct., at 1020.¹³

¹²²⁵We conclude that the State's enforcement, under these circumstances, of its closed primary system burdens the First Amendment rights of the Party. The interests which the appellant adduces in support of the statute are insubstantial, and accordingly the statute, as applied to the Party in this case, is unconstitutional.

IV

Appellant argues here, as in the courts below, that implementation of the Party rule would violate the Qualifications Clause of the Constitution, Art. I, § 2, cl. 1, and the Seventeenth Amendment because it would establish qualifications for voting in congressional elections which differ from the voting qualifications in elections for the more numerous house of the state legislature.¹⁴ The Party rule as adopted permits independent voters to vote in Party primaries for the offices of United States Senator and Member of the House of Representatives, and for statewide offices, but is silent as regards²²⁶ primaries held to contest nominations for seats in the state legislature. See *supra*, at 547. Appellant contends that the Qualifications Clause and the Seventeenth Amendment require an ab-

13. Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), were designed to prevent. We have observed on several occasions that a State may adopt a "policy of confining each voter to a single nominating act," a policy decision which is not involved in the present case. See *Anderson v. Celebrezze*, 460 U.S. 780, 802, n. 29, 103 S.Ct. 1564, 1577, n. 29, 75 L.Ed.2d 547 (1983); *Storer v. Brown*, *supra*, 415 U.S., at 743, 94 S.Ct., at 1285. The analysis of these situa-

tions derives much from the particular facts involved. "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" *Anderson v. Celebrezze*, *supra*, 460 U.S., at 789-790, 103 S.Ct., at 1570-1571 (quoting *Storer v. Brown*, *supra*, 415 U.S., at 730, 94 S.Ct., at 1279).

14. Article I, § 2, cl. 1, provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment, which provides for the direct election of United States Senators, states in pertinent part that "[t]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

solute symmetry of qualifications to vote in elections for Congress and the lower house of the state legislature, and that the Party rule, if implemented according to its terms, would require lesser qualifications for voting in Party primaries for federal office than for state legislative office.

The Court of Appeals rejected appellant's argument, holding that the Qualifications Clause and the parallel provision of the Seventeenth Amendment do not apply to primary elections. 770 F.2d, at 274. The concurring opinion took a different view, reaching the conclusion that these provisions require only that "anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote" in federal legislative elections. *Id.*, at 286 (Oakes, J., concurring). We agree.

We recognize that the Federal Convention, in adopting the Qualifications Clause of Article I, § 2, was not contemplating the effects of that provision upon the modern system of party primaries. As we have said:

"We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." *United States v. Classic*, 313 U.S. 299, 315-316, 61 S.Ct. 1031, 1037-1038, 85 L.Ed. 1368 (1941).

[277] The fundamental purpose underlying Article I, § 2, cl. 1, that "[t]he House of Representatives shall be composed of Members chosen ... by the People of the several States," like the parallel provision of the Seventeenth Amendment, applies to the entire process by which federal legislators are chosen. "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice," the requirements of Article I, § 2, cl. 1, and the Seventeenth Amendment apply to primaries as well as to general elections. *United States v. Classic*, *supra*, at 318, 61 S.Ct., at 1039; see *Smith v. Allwright*, 321 U.S. 649, 659-660, 64 S.Ct. 757, 762-763, 88 L.Ed. 987 (1944). The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process. If primaries were not subject to the requirements of the Qualifications Clauses contained in Article I, § 2 and the Seventeenth Amendment, the fundamental principle of free electoral choice would be subject to the sort of erosion these prior decisions were intended to prevent.

[9] Accordingly, we hold that the Qualifications Clauses of Article I, § 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections. Our task is then to discover whether, as appellant contends, those provisions require that voter qualifications, such as party membership, in primaries for federal office must be absolutely symmetrical with those pertaining to primaries for state legislative office.

Our inquiry begins with an examination of the Framers' purpose in enacting the first Qualifications Clause. It is clear that the Clause was intended to avoid the consequences of declaring a single standard for exercise of the franchise in federal elections. The state governments represented at the Convention had established varying

voter qualifications, and substantial concern was expressed by delegates as to the likely effects of a federal voting qualification which disenfranchised voters eligible to vote in the States. James ¹²²⁸Wilson argued that "[i]t would be very hard and disagreeable for the same persons, at the same time, to vote for representatives in the State Legislature, and to be excluded from a vote for those in the National Legislature." J. Madison, *Journal of the Federal Convention* 467 (E. Scott ed. 1893) (hereinafter *Madison's Journal*). Oliver Ellsworth predicted that "[t]he people will not readily subscribe to a National Constitution, if it should subject them to be disfranchised." *Id.*, at 468. Benjamin Franklin argued, in the same vein, that "[t]he sons of a substantial farmer, not being themselves freeholders, would not be pleased at being disfranchised, and there are a great many persons of that description." *Id.*, at 471. James Madison later defended the resulting provision on similar grounds:

"To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself." *The Federalist* No. 52, p. 354 (J. Cooke ed. 1961).

[10] In adopting the language of Article I, § 2, cl. 1, the Convention rejected the suggestion that a property qualification was necessary to restrict the availability of the federal franchise. See *Madison's Journal* 468-473; 2 M. Farrand, *The Records of the Federal Convention of 1787*, pp. 200-216 (1966). Far from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqual-

ified from participation in federal elections. The achievement of this goal does not require that qualifications for exercise of the federal franchise be at all ¹²²⁹times precisely equivalent to the prevailing qualifications for the exercise of the franchise in a given State. The fundamental purpose of the Qualifications Clauses contained in Article I, § 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives.

[11, 12] Our conclusion that these provisions do not require a perfect symmetry of voter qualifications in state and federal legislative elections takes additional support from the fact that we have not previously required such absolute symmetry when the federal franchise has been expanded. In *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), five Justices agreed that the Voting Rights Act Amendments of 1970 could constitutionally establish a minimum age of 18 for voters in federal elections, while a majority of the Court also concluded that Congress was without power to set such a minimum age in state and local elections. See *id.*, at 117-118, 91 S.Ct., at 261-262 (Black, J., announcing the judgments of the Court). Appellant's reading of the Qualifications Clause, which would require identical voter qualifications in state and federal legislative elections, is plainly inconsistent with these holdings. We hold that the implementation of the Party rule does not violate the Qualifications Clause or the Seventeenth Amendment because it does not disenfranchise any voter in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature.

V

We conclude that § 9-431 impermissibly burdens the rights of the Party and its

479 U.S. 231

Cite as 107 S.Ct. 544 (1986)

members protected by the First and Fourteenth Amendments. The interests asserted by appellant in defense of the statute are insubstantial. The judgment of the Court of Appeals is

Affirmed.

¹²³⁰Justice STEVENS, with whom Justice SCALIA joins, dissenting.

The threshold issue presented by this case is whether, consistently with the Constitution, a State may permit a voter to participate in elections to the Congress while preventing that same person from voting for candidates to the most numerous branch of the state legislature. If we respect the plain language of Article I, § 2, cl. 1, of the Constitution and the Seventeenth Amendment, the intent of the Framers, and the reasoning of the opinions in *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), we must answer that question in the negative.

Every person who votes in a federal election for a Member of the House of Representatives or for a United States Senator must be qualified to vote for candidates to the most numerous branch of the state legislature. The Constitution has imposed this condition of voter eligibility on congressional elections since 1789¹ and on senatorial elections since the Seventeenth Amendment was ratified in 1913.²

As the Court recognizes, *ante*, at 555-56, a primary election is part of the process by which Members of the House and Senate are "chosen . . . by the People." U.S. Const., Art. I, § 2, cl. 1. Cf. *United States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368 (1941). In Connecticut one of the qualifications for voters in Republican Party primary elections for the lower house of the state legislature is that the person be "on the last-completed enrol-

ment list of such party in the municipality or voting district. . . ." Conn.Gen.Stat. § 9-431 (1985). Thus, only enrolled Republicans may vote in the Republican primary for the state legislature.

¹²³¹The Court today holds, however, that pursuant to the Republican Party of Connecticut's rules, the State must permit independent, as well as enrolled Republican, electors to vote in the Republican primary for the House of Representatives and the Senate of the United States. This facial disparity between the qualifications for electors of House and Senate candidates and the more stringent qualifications for electors to the state legislature violates both Qualifications Clauses.

The Court does not dispute the fact that the plain language of the Constitution requires that voters in congressional and senatorial elections "shall have" the qualifications of voters in elections to the state legislature. The Court nevertheless separates the federal voter qualifications from their state counterparts, inexplicably treating the mandatory "shall have" language of the Clauses as though it means only that the federal voters "may but need not have" the qualifications of state voters. In support of this freewheeling interpretation of the Constitution, the Court relies on what it describes as the Framers' purpose in enacting the first Qualification Clause and on the judgment in *Oregon v. Mitchell*, *supra*. Neither of these arguments withstands scrutiny.

The excerpts from the debate among the Framers quoted by the Court, *ante*, at 555-56, related to a motion made by Gouverneur Morris to amend a draft of proposed Art. I, § 1, that had been prepared by the Committee on Detail. To understand the full significance of that debate it is necessary first to consider the provision that Gouverneur Morris wanted to change and

1. Article I, § 2, cl. 1, provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for

Electors of the most numerous Branch of the State Legislature."

2. "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

then to consider the nature of his proposed amendment.

Justice Stewart accurately summarized that background in his opinion in *Oregon v. Mitchell*, *supra*:

"An early draft of the Constitution provided that the States should fix the qualifications of voters in congressional elections subject to the proviso that these qualifications might 'at any Time be altered and superseded by the Legislature of the United States.' The records of ¹²²the Committee on Detail show that it was decided to strike the provision granting to Congress the authority to set voting qualifications and to add in its stead a clause making the qualifications 'the same from Time to Time as those of the Electors, in the several States, of the most numerous Branch of their own Legislatures.' The proposed draft reported by the Committee on Detail to the Convention included the following:

"The qualifications of the electors shall be the same, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures." Art. IV, § 1." 400 U.S., at 289, 91 S.Ct. at 347 (concurring in part and dissenting in part) (footnotes omitted; emphasis added).

Thus, the draft that the Federal Convention of 1787 was considering when Gouverneur Morris made his motion was abundantly clear—the qualifications of the federal electors "shall be the same" as the electors of the legislatures of the several States. J. Madison, *Journal of the Federal*

Convention 449-450 (E. Scott ed. 1893). This provision would ensure uniformity of electors' qualifications within each State, but would not impose a uniform nationwide standard.³

It was this clause that Gouverneur Morris proposed to strike in order to substitute a clause permitting Congress to prescribe the electoral qualifications or to adopt a provision "which would restrain the right of suffrage to freeholders." *Id.*, at 467. Not surprisingly, his proposal was defeated by a vote of 7 to 1 because it would have disenfranchised a large number of voters in States that did not impose a property qualification on the right to vote. *Id.*, at 467, 468, 471-472. Despite the Court's reliance on the concerns that led the ¹²³Framers to reject the Morris proposal, they shed absolutely no light on the reasons why the Committee on Detail had previously decided that the voters' qualifications in state and federal elections "shall be the same."

The Court's reliance on the holding in *Oregon v. Mitchell* is equally misguided. That case tested the constitutionality of certain parts of the Voting Rights Act Amendments of 1970, 84 Stat. 314, including the section that lowered the minimum age of voters in both state and federal elections from 21 to 18. Four Members of the Court concluded that Congress had no such power;⁴ four other Members of the Court concluded that the entire statute was valid.⁵ Thus, the conclusions of all eight of those Justices were consistent with the proposition that the Constitution requires the same qualifications for state and federal elections.⁶ Only Justice Black concluded

3. James Wilson referred to this part of the Report of the Committee on Detail as "well considered," and "he did not think it could be changed for the better. It was difficult to form any uniform rule of qualifications, for all the States." J. Madison, *Journal of the Federal Convention* 467 (E. Scott ed. 1893).

4. See opinion of Justice Harlan, 400 U.S., at 152, 212-213, 91 S.Ct., at 279, 308-309 (concurring in part and dissenting in part), and opinion of Justice Stewart, *id.*, at 281, 287-289, 91 S.Ct. at 343, 345-347 (joined by Burger, C.J., and BLACKMUN, J.).

5. See opinion of Justice Douglas, *id.*, at 135, 141-144, 91 S.Ct., at 270, 273-275, and the joint opinion, *id.*, at 229, 280-281 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

6. This was certainly the view of Justice Harlan, see *id.*, at 210-211, 91 S.Ct., at 308, and of Justice Stewart and the two Justices who joined his opinion, see *id.*, at 287-290, 91 S.Ct., at 345-347. As Justice Stewart observed: "The Constitution thus adopts as the federal standard the standard which each State has chosen for itself." *Id.*, at 288, 91 S.Ct., at 346. The opinions of Justice Douglas and Justice BRENNAN are silent on the issue.

that the statute was invalid insofar as it applied to state elections but valid insofar as it applied to federal elections. 400 U.S., at 125-130, 91 S.Ct., at 265-268.

Even Justice Black's reasoning, however, supports a literal reading of the Qualifications Clause in the absence of a federal statute prescribing a different rule for federal elections. For he relied entirely on the provision in Art. I, § 4, that empowers Congress to alter a State's regulations concerning the times, places, and manner of holding elections for Senators and Representatives. 400 U.S., at 119-124, 91 S.Ct., at 262-265. In Justice ¹²³Black's opinion, the qualifications that the States prescribed for their own voters for state offices "were adopted for federal offices unless Congress directs otherwise under Art. I, § 4." *Id.*, at 125, 91 S.Ct., at 265.

In this case there is no federal statute that purports to authorize the State of Connecticut to prescribe different qualifications for state and federal elections. Thus, there is no authority whatsoever for the Court's refusal to honor the plain language of the Qualifications Clauses. An interpretation of that language linking federal voters' qualifications in each State to the States' existing qualifications exactly matches James Madison's understanding:

"The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself." *The Federalist* No. 52, p. 354 (J. Cooke ed. 1961).

I respectfully dissent.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice O'CONNOR join, dissenting.

Both the right of free political association and the State's authority to establish arrangements that assure fair and effective party participation in the election pro-

cess are essential to democratic government. Our cases make it clear that the accommodation of these two vital interests does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case. See *Anderson v. Celebrezze*, 460 U.S. 780, 788-790, 103 S.Ct. 1564, 1569-1571, 75 L.Ed.2d 547 (1983); *Storer v. Brown*, 415 U.S. 724, 780, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). Even so, the conclusion reached on the individuated facts of one case sheds some measure of light upon the conclusion that will be reached on the individuated facts of the next. Since this is an area, moreover, in which the predictability of decisions is important,²³⁵ I think it worth noting that for me today's decision already exceeds the permissible limit of First Amendment restrictions upon the States' ordering of elections.

In my view, the Court's opinion exaggerates the importance of the associational interest at issue, if indeed it does not see one where none exists. There is no question here of restricting the Republican Party's ability to recruit and enroll Party members by offering them the ability to select Party candidates; Conn.Gen.Stat. § 9-56 (1985) permits an independent voter to join the Party as late as the day before the primary. Cf. *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973). Nor is there any question of restricting the ability of the Party's members to select whatever candidate they desire. Appellees' only complaint is that the Party cannot leave the selection of its candidate to persons who are *not* members of the Party, and are unwilling to become members. It seems to me fanciful to refer to this as an interest in freedom of association between the members of the Republican Party and the putative independent voters. The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an "association" with the

Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use. See *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 130-131, 101 S.Ct. 1010, 1023-1024, 67 L.Ed.2d 82 (1981) (POWELL, J., dissenting) ("[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights"; one must "look closely at the nature of the intrusion, in light of the nature of the association involved, to see whether we are presented with a real limitation on First Amendment freedoms").

The ability of the members of the Republican Party to select their own candidate, on the other hand, unquestionably ¹²³implies an associational freedom—but it can hardly be thought that that freedom is unconstitutionally impaired here. The Party is entirely free to put forward, if it wishes, that candidate who has the highest degree of support among Party members and independents combined. The State is under no obligation, however, to let its party primary be used, instead of a party-funded opinion poll, as the means by which the party identifies the relative popularity of its potential candidates among independents. Nor is there any reason apparent to me why the State cannot insist that this decision to support what might be called the independents' choice be taken *by the party membership in a democratic fashion*, rather than through a process that permits the members' votes to be diluted—and perhaps even absolutely outnumbered—by the votes of outsiders.

The Court's opinion characterizes this, disparagingly, as an attempt to "protect" the integrity of the Party against the Party itself." *Ante*, at 554. There are two problems with this characterization. The first, and less important, is that it is not true. We have no way of knowing that a majori-

ty of the Party's members is in favor of allowing ultimate selection of its candidates for federal and statewide office to be determined by persons outside the Party. That decision was not made by democratic ballot, but by the Party's state convention—which, for all we know, may have been dominated by officeholders and office seekers whose evaluation of the merits of assuring election of the Party's candidates, vis-à-vis the merits of proposing candidates faithful to the Party's political philosophy, diverged significantly from the views of the Party's rank and file. I had always thought it was a major purpose of state-imposed party primary requirements to protect the general party membership against this sort of minority control. See *Nader v. Schaffer*, 417 F.Supp. 837, 843 (Conn.), summarily aff'd, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976). Second and more important, however, *even if* it were the fact that the majority of the Party's members wanted its candidates to be ¹²⁷determined by outsiders, there is no reason why the State is bound to honor that desire—any more than it would be bound to honor a party's democratically expressed desire that its candidates henceforth be selected by convention rather than by primary, or by the party's executive committee in a smoke-filled room. In other words, the validity of the state-imposed primary requirement itself, which we have hitherto considered "too plain for argument," *American Party of Texas v. White*, 415 U.S. 767, 781, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974), presupposes that the State has the right "to protect the Party against the Party itself." Connecticut may lawfully require that significant elements of the democratic election process be democratic—whether the Party wants that or not. It is beyond my understanding why the Republican Party's delegation of its democratic choice to a Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot.

In the case before us, Connecticut has said no more than this: Just as the Repub-

lican Party may, if it wishes, nominate the candidate recommended by the Party's executive committee, so long as its members select that candidate by name in a democratic vote; so also it may nominate the independents' choice, so long as its members select him by name in a democratic

vote. That seems to me plainly and entirely constitutional.

I respectfully dissent.



**LEGISLATURE OF the STATE OF
CALIFORNIA et al., Petitioners,**

v.

**March Fong EU, as Secretary of State, etc., et
al., Respondents;
Californians For a Citizen Government,
Intervener.**

No. S019660.

**Supreme Court of California,
In Bank.**

Oct. 10, 1991.

State legislature brought petition for writ of mandate, challenging proposition whose stated purpose was to "restore a free and democratic system of fair elections" by limiting "the powers of incumbency." The Supreme Court, Lucas, C.J., held that: (1) proposition placed lifetime ban on service of more than the stated number of terms of office; (2) proposition was an amendment properly adopted by initiative rather than a constitutional revision requiring a constitutional convention or legislative submission; (3) limit on the number of terms which legislators and others may serve does not violate equal protection guarantees; (4) limitation on the number of terms is not a bill of attainder; (5) limits on legislative pensions could not be validly applied to legislators who were in office at the time of the adoption of the proposition; and (6) that provision is severable from remainder.

Petition granted in part and denied in part.

Mosk, J., filed an opinion concurring in part and dissenting in part.

[1] COURTS ⇨206(1)

106k206(1)

Supreme Court would exercise original jurisdiction over action by legislature challenging initiative whose stated purpose was to "restore free and democratic system of fair elections" by limiting "the powers of incumbency," as the case involved issues of significant public importance. West's Ann.Cal. Const. Art. 4, § 1.5.

[2] STATUTES ⇨301

361k301

Initiative power must be liberally construed to promote the democratic process and it is court's solemn duty to jealously guard the precious initiative power and to resolve any reasonable doubts in favor of its exercise. West's Ann.Cal. Const. Art. 4, § 1.

[3] CONSTITUTIONAL LAW ⇨48(4.1)

92k48(4.1)

Formerly 92k48(4)

All presumptions favor validity of initiative measures, and mere doubts as to validity are insufficient; measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. West's Ann.Cal. Const. Art. 4, § 1.

[4] STATUTES ⇨325

361k325

Indicia of the intent of the voters with respect to initiative measure includes analysis and arguments contained in the official ballot pamphlet.

[5] STATES ⇨47

360k47

Limitation on number of terms which may be served by various state officials imposed by initiative measure was a lifetime ban after the stated number of terms had been served and did not permit nonconsecutive terms exceeding the number of terms set forth in the measure. West's Ann.Cal. Const. Art. 4, §§ 1.5, 2(a), 4.5.

[6] STATUTES ⇨325

361k325

Ballot measure opponents frequently overstate the adverse effects of the challenged measure and their fears and doubts are not highly authoritative in construing the measure.

[7] CONSTITUTIONAL LAW ⇨8

92k8

Electors may amend Constitution by initiative, but revision of the Constitution may be accomplished only by convening constitutional convention and obtaining popular ratification or by legislative submission of the measure to the voters; "revision" need not involve widespread deletions, additions, amendments affecting host of constitutional provisions and resulting in a quantitative revision;

substantial changes in either quantitative or qualitative effects may amount to a revision and a relatively simple enactment may accomplish such far reaching changes in the nature of basic governmental plan as to amount to a revision. West's Ann.Cal. Const. Art. 18, §§ 1-4.

See publication Words and Phrases for other judicial constructions and definitions.

[7] CONSTITUTIONAL LAW ☞9(.5)
92k9(.5)

Formerly 92k9

Electors may amend Constitution by initiative, but revision of the Constitution may be accomplished only by convening constitutional convention and obtaining popular ratification or by legislative submission of the measure to the voters; "revision" need not involve widespread deletions, additions, amendments affecting host of constitutional provisions and resulting in a quantitative revision; substantial changes in either quantitative or qualitative effects may amount to a revision and a relatively simple enactment may accomplish such far reaching changes in the nature of basic governmental plan as to amount to a revision. West's Ann.Cal. Const. Art. 18, §§ 1-4.

See publication Words and Phrases for other judicial constructions and definitions.

[8] CONSTITUTIONAL LAW ☞9(.5)
92k9(.5)

Formerly 92k9

Amendment to Constitution limiting the number of terms which legislators and other officers may serve and limiting the size of the budget for legislative operations did not effect a qualitative revision of the Constitution and could be adopted by initiative. West's Ann.Cal. Const. Art. 4, § 1.5; Art. 18, §§ 1-4.

[9] CONSTITUTIONAL LAW ☞9(.5)
92k9(.5)

Formerly 92k9

In order for constitutional amendment to work a revision of the Constitution, so that it may not be adopted by initiative, it must necessarily or inevitably appear from the face of the provision that the measure will substantially alter the basic governmental framework set forth in the Constitution. West's Ann.Cal. Const. Art. 18, §§ 1-4.

[10] CONSTITUTIONAL LAW ☞9(.5)
92k9(.5)

Formerly 92k9

Fact that particular constitutional change was adopted at a constitutional convention does not necessarily indicate that the change was a revision which could not have been adopted by initiative. West's Ann.Cal. Const. Art. 18, §§ 1-4.

[11] CONSTITUTIONAL LAW ☞9(1)
92k9(1)

Initiative measure which placed limits on the number of terms which elected officials could serve, restricted amount which legislature could appropriate for legislative operations, and placed limits on legislative pensions did not violate single subject provision of the Constitution, as the entire measure related to incumbency reform. West's Ann.Cal. Const. Art. 2, § 8(d); Art. 4, §§ 1.5, 4.5.

[12] CONSTITUTIONAL LAW ☞9(1)
92k9(1)

Single subject provision of the Constitution does not require that each of the provisions of a measure effectively interlock in a functional relationship; it is enough that the various provisions are reasonably related to a common theme or purpose. West's Ann.Cal. Const. Art. 2, § 8(d).

[13] CONSTITUTIONAL LAW ☞9(.5)
92k9(.5)

Formerly 92k9

Compelling interest standard was not applicable to challenge to constitutional amendment placing limits on the number of terms which legislators and other officers could serve. West's Ann.Cal. Const. Art. 4, §§ 1.5, 4.5; U.S.C.A. Const.Amends. 1, 14.

[14] CONSTITUTIONAL LAW ☞238.5
92k238.5

Permanent incumbency limitations proposed by constitutional amendment were supported by legitimate and compelling considerations justifying any legal impact on voters and candidates, and thus did not violate equal protection guarantees. West's Ann.Cal. Const. Art. 4, §§ 1.5, 4.5; U.S.C.A. Const.Amends. 1, 14.

[14] STATES ☞47
360k47

Permanent incumbency limitations proposed by constitutional amendment were supported by

legitimate and compelling considerations justifying any legal impact on voters and candidates, and thus did not violate equal protection guarantees. West's Ann.Cal. Const. Art. 4, §§ 1.5, 4.5; U.S.C.A. Const.Amends. 1, 14.

[15] STATES ⇨47
360k47

There were no less restrictive measures which could have been adopted to accomplish object of constitutional amendment placing limit on terms which legislators can impose, as only a lifetime ban can protect against various kinds of continuing exploitation of the "advantages of incumbency" sought to be eliminated. West's Ann.Cal. Const. Art. 4, §§ 1.5, 4.5; U.S.C.A. Const.Amends. 1, 14.

[16] CONSTITUTIONAL LAW ⇨82.5
92k82.5

Constitutional amendment placing limit on the number of terms which legislators and other state officials may serve was not an unlawful bill of attainder, even though proponents of the initiative measure had argued that one of the effects of adoption would be to end the reign of two powerful legislative officers. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's Ann.Cal. Const. Art. 4, §§ 1.5, 4.5.

[16] STATES ⇨47
360k47

Constitutional amendment placing limit on the number of terms which legislators and other state officials may serve was not an unlawful bill of attainder, even though proponents of the initiative measure had argued that one of the effects of adoption would be to end the reign of two powerful legislative officers. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's Ann.Cal. Const. Art. 4, §§ 1.5, 4.5.

[17] CONSTITUTIONAL LAW ⇨102(2)
92k102(2)

Constitutional provision authorizing legislature to limit retirement benefits payable to members of the legislature if it does so prior to their retirement does not preclude legislators from acquiring vested right to continue to earn pension benefits. West's Ann.Cal. Const. Art. 4, § 4.

[17] STATES ⇨64.1(3)
360k64.1(3)

Constitutional provision authorizing legislature to

limit retirement benefits payable to members of the legislature if it does so prior to their retirement does not preclude legislators from acquiring vested right to continue to earn pension benefits. West's Ann.Cal. Const. Art. 4, § 4.

[18] CONSTITUTIONAL LAW ⇨102(2)
92k102(2)

Incumbent legislators had vested right to earn additional pension benefits through continued service pursuant to statutes in effect at the time of their service, and constitutional amendment limiting legislative pensions worked an impermissible impairment of those vested rights as applied to incumbent legislators. West's Ann.Cal. Const. Art. 4, § 4.

[18] STATES ⇨64.1(3)
360k64.1(3)

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[19] CONSTITUTIONAL LAW ⇨102(2)
92k102(2)

Legislator's vested right to acquire reasonable pension is not subject to absolute divesting at the conclusion of the period comprising his or her immediate term of office, and constitutional amendment limiting legislative pensions could not be applied to incumbent legislators when they commenced new terms after the adoption of the amendment. West's Ann.Cal. Const. Art. 4, § 4.

[19] STATES ⇨64.1(2)
360k64.1(2)

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[19] STATES ⇨64.1(3)
360k64.1(3)

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[20] CONSTITUTIONAL LAW ⇨140(1)
92k140(1)

State or local subdivisions have the power at any time to create, alter, or abolish state or local public offices and thereby reduce the affected officers' salaries or other compensation, unfettered by federal contract clause restrictions. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[20] STATES ⇨58
360k58

State or local subdivisions have the power at any time to create, alter, or abolish state or local public offices and thereby reduce the affected officers' salaries or other compensation, unfettered by federal contract clause restrictions. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[21] CONSTITUTIONAL LAW ⇨102(2)
92k102(2)

Legislators who first assumed office after adoption of constitutional amendment limiting legislative pensions had no vested or protectible right to continuation of pension system in operation prior to their employment and measure could be applied to them without violating the Federal Constitution's contracts clause. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's Ann.Cal. Const. Art. 4, §§ 4, 4.5.

[21] STATES ⇨64.1(2)
360k64.1(2)

Legislators who first assumed office after adoption of constitutional amendment limiting legislative pensions had no vested or protectible right to continuation of pension system in operation prior to their employment and measure could be applied to them without violating the Federal Constitution's contracts clause. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's Ann.Cal. Const. Art. 4, §§ 4, 4.5.

[22] CONSTITUTIONAL LAW ⇨12
92k12

Although portion of proposition which placed limits

on pensions was invalid, the remaining provisions of the measure, dealing with number of terms of office and legislative expenditures, could be given effect without regard to the invalidity of the provision with respect to pensions, and that provision would be severed. West's Ann.Cal. Const. Art. 4, §§ 1.5, 4.5, 7.5.

[23] CONSTITUTIONAL LAW ⇨12
92k12

Severance of particular provisions from initiative proposition amending the constitution is permissible even in the absence of a formal severance clause.

***285 **1311 *499 Denise Hulett, Antonia Hernandez, Remcho, Johansen & Purcell, Joseph Remcho, Robin B. Johansen, Lowell Finley, Barbara A. Brenner and Charles C. Marson, for petitioners.

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Stephen R. Barnett, as amicus curiae on behalf of respondents.

Ronald A. Zumbrun, John H. Findley, Jonathan M. Coupal, Meredith M. Chang and Deborah J. Martin, for intervener.

Martin A. Schainbaum, Daniel J. Popeo and John C. Scully, as amici curiae on behalf of respondents and intervener.

LUCAS, Chief Justice.

In this proceeding, we consider constitutional

(Cite as: 54 Cal.3d 492, *499, 816 P.2d 1309, **1312, 286 Cal.Rptr. 283, ***286)

challenges to an initiative measure adopted at the November 6, 1990, General Election. This measure, entitled by its framers "The Political Reform Act of 1990," was designated on the ballot as Proposition 140. Its stated purpose is to "restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office" by limiting "the powers of *500 incumbency." (Cal.Const., art. IV, § 1.5, added by Prop. 140.) The measure seeks to accomplish these goals by these three separate reforms: "Retirement benefits [of legislators] must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served." (Ibid.)

Petitioners herein include the California Legislature (both Senate and Assembly), certain individual legislators from both houses, and various citizens, voters and taxpayers. Petitioners jointly assert a variety of challenges to the constitutionality of Proposition 140.

Respondents are various public officials (including the Secretary of State, the state Controller, and the Board of Administration of the Public Employees Retirement System [PERS]) responsible for implementing, enforcing or applying the new measure. Intervener, Californians for a Citizen Government, is the organization that sponsored Proposition 140. Several amici curiae have filed briefs supporting the various parties.

Only intervener (represented by the Pacific Legal Foundation) and respondent Secretary of State (represented by the Attorney General) have filed briefs adverse to petitioners. Respondent state Controller remains neutral, while respondent PERS supports petitioners' challenge to the pension limitations of Proposition 140, but takes no position on the remaining issues. Nonetheless, for convenience, we sometimes refer to intervener and respondent Secretary of State jointly as "respondents."

[1] The petition for mandate sought original relief in this court. Although we customarily decline to exercise such jurisdiction, preferring initial disposition by the lower courts, the present case involves issues of sufficient public importance to justify departing from our usual course. As we recently observed in *Raven v. Deukmejian* (1990) 52

Cal.3d 336, 340, 276 Cal.Rptr. 326, 801 P.2d 1077 (assessing the constitutionality of Proposition 115, an initiative measure adopted at the June 1990 Primary Election), quoting from an earlier case, "It is uniformly agreed that the issues are of great public importance and should be resolved promptly. Accordingly, under well settled principles, it is appropriate that we exercise our original jurisdiction. [Citations.]' ..." (See also *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 262-265, 226 Cal.Rptr. 361.)

Pending our review of the issues, on June 14, 1991, we temporarily stayed operation of section 5 of Proposition 115, which imposes budgetary restrictions on the Legislature, as hereafter discussed.

[2][3] The principles that guide us in evaluating the validity of initiative measures such as Proposition 140 are likewise well settled. Although the *501 legislative power under our state Constitution is vested ***287 in **1313 the Legislature, "the people reserve to themselves the powers of initiative and referendum." (Cal. Const., art. IV, § 1.) Accordingly, the initiative power must be liberally construed to promote the democratic process. (*Raven v. Deukmejian*, supra, 52 Cal.3d at p. 341, 276 Cal.Rptr. 326, 801 P.2d 1077.) Indeed, it is our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise. (Ibid., and cases cited.) As with statutes adopted by the Legislature, all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814, 258 Cal.Rptr. 161, 771 P.2d 1247 [evaluating the constitutionality of Prop. 103, an insurance rate initiative measure adopted at the Nov. 1988 Gen. Elec.])

As will appear, we conclude that although the pension restrictions of Proposition 140 are invalid as to incumbent legislators, the measure is constitutionally valid in all other respects. Before addressing petitioners' challenges, we briefly outline the basic provisions of the new measure, which consists entirely of various amendments to the state Constitution.

I. SUMMARY OF PROPOSITION 140

A. Statement of Purpose and Findings

Section 1.5 is added to article IV of the Constitution (the "Legislative" article), to set forth various findings and statements of the framers' intent. In pertinent part, this introductory provision recites that although "the Founding Fathers established a system of representative government based upon free, fair, and competitive elections," nonetheless an "extremely high number of incumbents" are reelected by reason of "[t]he ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense...."

The introductory statement continues by noting that "These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers." The statement concludes by stating that, "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited," as provided by the substantive amendments we now discuss.

B. Term Limitations

The measure imposes specific term limitations for state legislators and various state constitutional officers. Persons elected or appointed on or after *502 November 6, 1990, to the office of Governor (Cal. Const., art. V, § 2), Lieutenant Governor (id., § 11), Attorney General (ibid.), Controller (ibid.), Secretary of State (ibid.), Treasurer (ibid.), Superintendent of Public Instruction (id., art. IX, § 2), or to the State Board of Equalization (id., art. XIII, § 17), or the state Senate (id., art. IV, § 2, subd. (a)), are limited to two terms. Members of the Assembly are limited to three terms (ibid.).

Section 7 is added to article XX of the Constitution (the "Miscellaneous Subjects" article), to explain that the foregoing term limitations "apply only to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the ballot for the general election on that date may serve only one additional term," and that the foregoing term

limits "shall not apply to any unexpired term to which a person is elected or appointed if the remainder of the term is less than half of the full term."

C. Budgetary Limitations

The measure imposes a budgetary limitation for the Legislature. Section 7.5 is added to article IV of the Constitution to provide that, for the forthcoming fiscal year, "the total aggregate expenditures of the Legislature for the compensation of ***288 **1314 members and employees of, and the operating expenses and equipment for, the Legislature may not exceed" \$950,000 "per member" for that fiscal year, or 80 percent of the amount of money expended for such purposes in the preceding year, whichever is less.

Additionally, new section 7.5 of article IV of the Constitution provides that, for each fiscal year thereafter, the total aggregate expenditures may not exceed the amount expended during the previous year, "adjusted and compounded by an amount equal to the percentage increase in the appropriations limit for the state established pursuant to Article XIII B" of the Constitution.

D. Pension Limitations

Finally, the measure imposes limitations on legislators' pension rights. New section 4.5 is added to article IV of the Constitution to provide that the state will contribute the employer's share to the federal Social Security system on behalf of participating legislators "elected to or serving in the Legislature on or after November 1, 1990," but "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation."

This same provision further provides that "This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit *503 which may have accrued under an existing law ..., but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than [federal] Social Security...."

Respondent state Controller confirms that, as of the effective date of Proposition 140, he ceased making

(Cite as: 54 Cal.3d 492, *503, 816 P.2d 1309, **1314, 286 Cal.Rptr. 283, ***288)

deductions from the salaries of incumbent legislators for the Legislators' Retirement Fund in connection with services rendered after that date, and has also terminated paying employer or state contributions to that fund for those services.

E. Severance Clause

In addition to the foregoing provisions, subdivision (d) is added to section 11 of article VII of the Constitution (the "Public Officers and Employees" article). Section 11 of article VII previously had limited the obligations of the Legislators' Retirement System to persons first entering state office after January 1, 1987. Subdivision (d) now sets forth a severance clause reciting that "If any part of this measure or the application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications which reasonably can be given effect without the invalid provision or application." We discuss the matter of severance below in connection with our discussion of the invalid pension restrictions.

II. DISCUSSION

A. Lifetime Ban or Limit on Consecutive Terms

As a preliminary matter, we must address the interpretive question whether Proposition 140 imposes a "lifetime ban" on officers who have served the specified number of terms, or merely limits the number of consecutive terms they may serve. With respect to state legislators, petitioners and intervenor assume that once a legislator has served the prescribed maximum number of terms, the measure would forever bar him or her from running for a seat in the legislative house previously served. Respondent Secretary of State, contends, however, that the term limitation "is directed only at the incumbent office holder." (*Italics in original.*) In her view, the measure simply limits the number of consecutive terms served, and she suggests that a former legislator might run for a new term of office if he or she is not currently holding that office.

We focus first on the language of the new measure. The introduction to Proposition 140 refers to curtailing "[t]he ability of legislators to serve unlimited ... terms," by limiting "the number of terms which may be served." (Cal. Const., art. IV, § 1.5.) Thus, the limitation on the term of state *504 senators adds the language, "No ***289

senator **1315 may serve more than 2 terms," to the existing language of the Constitution that "The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years." (Cal. Const., art. IV, § 2, subd. (a).) The limitation on Assembly members is similarly phrased, stating that "No member of the Assembly may serve more than 3 terms." (*Ibid.*) As petitioners observe, the foregoing provisions do not expressly refer to the number of consecutive terms served. Moreover, the measure repeatedly announces its intent to eliminate "career politicians" (see Cal. Const., art. IV, §§ 1.5, 4.5), language which would support the view that a lifetime ban was intended.

Respondent Secretary of State points out, however, that these limitations are directed to a "Senator" or "member of the Assembly," rather than a "person," and she argues that a literal interpretation of the measure thus discloses an intent to limit the right of an incumbent legislator to continue unabated terms in office. In respondent Eu's view, once the incumbent legislator has left office, he or she can no longer be described as a "Senator" or "member of the Assembly" to which the term limitation provision would apply.

Petitioners argue that even a purely literal reading of Proposition 140 would support their interpretation: A person who, having already served two prior terms as Senator, surrenders his or her seat for one term and thereafter enters on a third Senate term, could be accurately described as a "Senator" who is "serv[ing] more than 2 terms" contrary to the language of Proposition 140. Intervenor suggests that respondent Eu's interpretation, with its emphasis on limiting only incumbents, could lead to absurd results, permitting a legislator to avoid the term limitations by resigning shortly before his or her final term had expired, and thereupon announcing an intent to run for reelection unencumbered by any term limitations applicable to "incumbents."

[4][5] Nonetheless, we agree with respondent Eu that the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban. As we have previously recognized, to help resolve such ambiguities "it is appropriate to consider indicia of the voters' intent other than the language of the provision itself. [Citation.]" (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d

(Cite as: 54 Cal.3d 492, *504, 816 P.2d 1309, **1315, 286 Cal.Rptr. 283, ***289)

245, 250, 279 Cal.Rptr. 325, 806 P.2d 1360.) Such indicia include the analysis and arguments contained in the official ballot pamphlet. (See *ibid.*; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246, 149 Cal.Rptr. 239, 583 P.2d 1281 [hereafter *Amador*].) These materials strongly support the position of petitioners and intervenor that a lifetime ban from office was contemplated by the framers of, and voters for, Proposition 140.

*505 First, the analysis by the Legislative Analyst described the term limitations as limiting "the number of terms that an elected state official can serve in the same office...." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with argument to voters, Gen. Elec. (Nov. 6, 1990) p. 69, italics in original [hereafter *Ballot Pamphlet*].) No suggestion is made that only a consecutive term limitation was contemplated.

Second, and more significantly, the opponents' ballot arguments against Proposition 140 forcefully and repeatedly stressed the measure's "lifetime ban," and criticized the proponents' failure to disclose that particular aspect of the measure in their arguments to the voters. Indeed, the primary thrust of the opponents' ballot arguments was directed to this aspect of the measure. (See *Ballot Pamp.*, supra, at pp. 70-71.) The argument against Proposition 140 used the phrases "lifetime ban," "banned for life," or similar terminology 11 times. (*Ibid.*)

[6] We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their "fears and doubts" are not highly authoritative in construing the measure. (*DeBartolo Corp. v. Fla. Gulf Coast Trades Council* (1988) 485 U.S. 568, 585, 108 S.Ct. 1392, 1402, 99 L.Ed.2d ***290**1316 645.) Nonetheless, we find it significant that the proponents failed to contradict the opponents' "lifetime ban" argument. (See *D'Amico v. Board of Medical Examiners* (1970) 6 Cal.App.3d 716, 725, 86 Cal.Rptr. 245.) Moreover, the proponents stressed that Proposition 140 was directed at eliminating "career politicians" or "career legislators," and suggested that "good legislators will always have the opportunity to move up the ladder." (Italics added.) These arguments seem to reinforce the idea that a lifetime ban was intended.

We think it likely the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated a lifetime ban against candidacy for the office once the prescribed maximum number of terms had been served. As we stated in *In re Lance W.* (1985) 37 Cal.3d 873, 889, 210 Cal.Rptr. 631, 694 P.2d 744, "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." (Italics added.)

Respondent Eu suggests that the applicable principle of interpretation requires us to avoid any constitutional "doubts" or "difficulties" by adopting a construction which will render the measure constitutional. (E.g., *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333-334, 138 Cal.Rptr. 26.) We find no cases suggesting, however, that this interpretive principle precludes resort to extrinsic evidence to resolve possible ambiguities in a measure. Moreover, as *506 we explain in this opinion, the measure's lifetime ban is constitutional in all respects.

We conclude that Proposition 140's term limitations extend over the lifetime of each affected office holder.

B. Constitutional Revision or Amendment

[7] Turning to petitioners' constitutional challenges to Proposition 140, they first contend that the measure, and particularly its term and budgetary limitations on the Legislature, effected a constitutional revision rather than a mere amendment. Although "[t]he electors may amend the Constitution by initiative" (Cal. Const., art. XVIII, § 3), a "revision" of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification (*id.*, §§ 2, 4), or by legislative submission of the measure to the voters (*id.*, §§ 1, 4). (See also *Raven v. Deukmejian*, supra, 52 Cal.3d at p. 349, 276 Cal.Rptr. 326, 801 P.2d 1077.)

Raven suggested that the revision provision is based on the principle that "comprehensive changes" to the Constitution require more formality, discussion and deliberation than is available through the initiative

(Cite as: 54 Cal.3d 492, *506, 816 P.2d 1309, **1316, 286 Cal.Rptr. 283, ***290)

process. (52 Cal.3d at pp. 349-350, 276 Cal.Rptr. 326, 801 P.2d 1077.) We should bear in mind, however, that the initiative process may represent the only practical means of achieving the kind of "reforms" of the Legislature involved here, because the revision process can be initiated only with the consent of two-thirds membership of each house of the Legislature. (Cal. Const., art. XVIII, §§ 1, 2.)

****1317** In *Raven*, citing earlier cases, we observed, "Although the Constitution does not define the terms 'amendment' or 'revision,' the courts have developed some guidelines helpful in resolving the present issue. As explained [in prior cases], our revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision." (52 Cal.3d at p. 350, 276 Cal.Rptr. 326, 801 P.2d 1077.)

Thus, a constitutional "revision" need not involve widespread deletions, additions and amendments affecting a host of constitutional provisions and resulting in a quantitative revision. "[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also." (Amador, *supra*, 22 Cal.3d at p. 223, 149 Cal.Rptr. 239, 583 P.2d 1281; see *Raven v. Deukmejian*, *supra*, 52 Cal.3d at pp. 351-352, 276 Cal.Rptr. 326, 801 P.2d 1077.)

*****291** In *Raven*, we unanimously struck down as an improper revision the provision of Proposition 115 that, in essence, would have vested in the *507 United States Supreme Court all interpretive power as to certain fundamental procedural rights of criminal defendants under the state Constitution. We observed that the challenged provision would have "devastating" effects, by drastically limiting the procedural rights of criminal defendants, by infringing on the power of the state judiciary to protect California citizens from arbitrary or capricious legislation, and by substantially altering the substance and integrity of the state Constitution as a document of independent force and effect. (52 Cal.3d at pp. 352-354, 276 Cal.Rptr. 326, 801 P.2d 1077.)

Petitioners assert the effects of the term and budgetary limitations of Proposition 140 on the

Legislature are similarly dramatic, causing far-reaching changes in our basic governmental plan. As they phrase the argument, "Weakened by budget cuts and harsh term limits, the Legislature will be unable to discharge its traditional duties of policymaker, keeper of the purse, and counterweight to the executive branch in the way the Constitution intends. The result is a change so profound in the structure of our government that it constitutes a revision...."

In petitioners' words, the new term limitations will "virtually guarantee that California will have a new Legislature—that is, a Legislature in which the vast majority of the members are new—every six years." Petitioners note that legislators with "substantial experience" and valuable "expertise" ultimately will be required to surrender forever their legislative offices, and persons with minimal legislative experience will be appointed chairpersons of major committees. Petitioners predict that the Governor's role in the delicately balanced state governmental process will grow as inexperienced legislators become "susceptible to the subtle pressures of the gubernatorial power of appointment."

Additionally, according to petitioners, the power of special interest groups to defeat legislative programs will be enhanced. Those groups opposing legislation proposed by "lame duck legislators" can merely "wait until they leave to dismantle it." Petitioners suggest that inexperienced legislators, lacking any background in "dealing with the budget" or "dealing with each other," will be greatly hindered in their ability to review and pass a satisfactory state budget. They note that several legislators currently serving on key budget committees have done so for periods far in excess of the terms now permitted by Proposition 140.

As for the budgetary limitations imposed by Proposition 140, petitioners observe that the new measure will force a substantial reduction in the funds available for compensating legislators and their staffs, and defraying legislative operating expenses. Approximately \$176 million was appropriated for the Legislature for the 1990-1991 fiscal year, but under Proposition 140 only *508 \$114 million would be appropriated for the current fiscal year, resulting in a substantial reduction in funds. As the Legislative Analyst explained in the voters' ballot pamphlet, "In 1991-92, expenditures

(Cite as: 54 Cal.3d 492, *508, 816 P.2d 1309, **1317, 286 Cal.Rptr. 283, ***291)

by the Legislature would be reduced by about 38 percent, or \$70 million." (Ballot Pamp., supra, at p. 69.)

According to petitioners, and undisputed by respondents, in anticipation of the forthcoming budgetary reduction, "as of March 1, 1991, more than 640 employees will have left the Legislature as a result of Proposition 140." For the current fiscal year, "all [Senate] standing committee budgets will be reduced by 20% and all subcommittees and select committees will be eliminated.... The Assembly expects to have to take similar steps."

Petitioners note that among those departing from the Legislature are experienced consultants previously hired to provide accurate information concerning proposed or pending legislation. Petitioners predict the Legislature will become "an essentially reactive body," dependent on lobbyists and special interest groups as a source of information, and lacking sufficient funds to develop its own "legislative agenda."

***292 **1318 After we granted review in this matter, petitioners sought a stay of the budgetary limitation provisions of Proposition 140, claiming that the offices of Legislative Analyst and Auditor General would be jeopardized unless a stay were granted prior to June 15, 1991, when the proposed budget for the forthcoming fiscal year must be sent to the Governor. (Cal. Const., art. IV, § 12, subd. (c).) Although intervenor suggested that petitioners' request amounted to mere "gamesmanship" designed to lend support to their revision challenge, as previously indicated we issued a temporary stay pending our review of the issues.

[8] As previously noted, petitioners contend that the combined effects of the foregoing term and budgetary limitations on California's "basic governmental plan" will be as devastating and far reaching as those involved in the provision of Proposition 115 invalidated by us in *Raven v. Deukmejian*, supra, 52 Cal.3d 336, 276 Cal.Rptr. 326, 801 P.2d 1077. They thus assert that Proposition 140 has achieved a qualitative revision of the Constitution. We disagree.

First, the basic and fundamental structure of the Legislature as a representative branch of government is left substantially unchanged by Proposition 140.

Term and budgetary limitations may affect and alter the particular legislators and staff who participate in the legislative process, but the process itself should remain essentially as previously contemplated by our Constitution. This aspect distinguishes the present case from *Raven*, in which we struck down a provision that would have fundamentally changed and *509 subordinated the constitutional role assumed by the judiciary in the governmental process. (See also *Amador*, supra, 22 Cal.3d 208, 223, 149 Cal.Rptr. 239, 583 P.2d 1281 [posing hypothetical example of provision vesting all judicial power in Legislature].)

As indicated in *Raven*, a qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches. (*Raven*, supra, 52 Cal.3d at pp. 352-355, 276 Cal.Rptr. 326, 801 P.2d 1077.) *Raven* invalidated a portion of Proposition 115 because it deprived the state judiciary of its foundational power to decide cases by independently interpreting provisions of the state Constitution, and delegated that power to the United States Supreme Court. (*Ibid.*)

By contrast, Proposition 140 on its face does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched.

Second, although the immediate foreseeable effects of the foregoing term and budgetary limitations are indeed substantial (primarily, the eventual loss of experienced legislators and some support staff), the assertedly momentous consequences to our governmental scheme are largely speculative ones, dependent on a number of as yet unproved premises.

Petitioners assume, for example, that the eventual loss of experienced legislators, and the arrival of their relatively unseasoned replacements, will irreparably hinder and damage the legislative process. Yet respondents argue with equal conviction that Proposition 140's term limitations

(Cite as: 54 Cal.3d 492, *509, 816 P.2d 1309, **1318, 286 Cal.Rptr. 283, ***292)

will free the entire process from the control of assertedly entrenched, apathetic, veteran incumbents, thereby allowing fresh creative energies to flourish free of vested, self-serving legislative interests. Respondents also note that the office of Governor is likewise subject to the limitation of two terms under Proposition 140, thus lessening the likelihood that the Legislature will become a subordinate branch.

In similar fashion, whereas petitioners forecast bleak consequences from the budgetary limitations and consequent loss of experienced support staff, respondents assume the monetary restraints will contribute in a positive manner toward eliminating ***293 **1319 excessive legislative spending and terminating surplus or inefficient personnel.

*510 Petitioners view these budgetary limitations as akin to infringements on the Legislature's inherent "power of self-preservation" as an independent branch of government. (See *Millholen v. Riley* (1930) 211 Cal. 29, 33-34, 293 P. 69; see also *Brown v. Superior Court* (1982) 33 Cal.3d 242, 248, fn. 5, 188 Cal.Rptr. 425, 655 P.2d 1260.) In petitioners' words, "a 38% reduction in funds for the Legislature threatens the functioning of that branch and alters the structure of government." Respondents, on the other hand, assert that the remaining budget allocation (nearly \$1 million per legislator for the current fiscal year) is more than ample to provide an effective and efficient legislative staff.

Intervener declares that the Legislature's budget has increased 838 percent during the period from 1968 to 1990, while the Governor's budget increased only 417 percent during this same period. Thus, even after the 38 percent budget cut attributable to Proposition 140, the Legislature's budget will have increased at a substantially greater rate than the Governor's budget over the last 22 years.

[9] We are in no position to resolve the controversy between the parties regarding the long-term consequences of Proposition 140, for the future effects of that measure on our "basic governmental plan" are simply unfathomable at this time. Indeed, that very uncertainty inhibits us from holding that a constitutional revision has occurred in this case. Our prior decisions have made it clear that to find such a revision, it must necessarily or inevitably

appear from the face of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261, 186 Cal.Rptr. 30, 651 P.2d 274 [rejecting argument that Prop. 8 (see Cal. Const., art. I, § 28) involved improper constitutional revision]; *id.*, at pp. 258-259, 186 Cal.Rptr. 30, 651 P.2d 274 [rejecting argument that Prop. 8 would improperly cause impairment of essential governmental functions]; *Amador*, *supra*, 22 Cal.3d at pp. 224-226, 149 Cal.Rptr. 239, 583 P.2d 1281 [nothing on face of Prop. 13 (see Cal. Const., art. XIII A) "necessarily and inevitably" would result in loss of home rule]; see *Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 349, 276 Cal.Rptr. 326, 801 P.2d 1077 ["nothing on the face of the challenged measures [Prop. 115] 'necessarily or inevitably' compels" dire economic consequences predicted by petitioners in context of single-subject rule challenge].)

In *Amador*, we considered and rejected a similar revision challenge based on the predicted dire economic consequences to home rule in California arising from the property tax limitations of Proposition 13. We recognized the potential "limiting effect" on local government that would result from the substantial reduction in tax revenues contemplated by the measure, but we *511 concluded that such economic consequences were insufficient to accomplish a constitutional revision. (22 Cal.3d at p. 225, 149 Cal.Rptr. 239, 583 P.2d 1281.)

Similarly, in *Brosnahan v. Brown*, *supra*, 32 Cal.3d at page 261, 186 Cal.Rptr. 30, 651 P.2d 274, we observed that "petitioners' forecast of judicial and educational chaos is exaggerated and wholly conjectural, based primarily upon essentially unpredictable fiscal or budgetary constraints." In the present case, petitioners' prediction that Proposition 140 will "profoundly alter the Legislature's ability to perform its constitutional functions," seems similarly conjectural and speculative. The same objection disposes of petitioners' suggestion, raised only in a footnote, that Proposition 140 may threaten to "impair essential governmental functions" (see *Brosnahan v. Brown*, *supra*, 32 Cal.3d at pp. 258-260, 186 Cal.Rptr. 30, 651 P.2d 274), or to "radically undercut[] representative democracy" (see *Amador*, *supra*, 22 Cal.3d at pp. 227-228, 149 Cal.Rptr. 239,

583 P.2d 1281).

Petitioners assert that, from an historical standpoint, changes similar in nature to Proposition 140 have been achieved only through formal constitutional revisions. They note that in 1878, as a result of convening a constitutional convention, provisions ***1320 ***294 were adopted that "reduced the Legislature from a full-time body to one that met only biennially and then was only allowed to be paid for sixty days.... That system prevailed until 1966, when the Constitution was revised a second time and the Legislature once again became a full-time body." According to petitioners, any such changes "could only have been done as part of a revision."

[10] Of course, the fact that a particular constitutional change was adopted at a constitutional convention does not necessarily indicate the change was a revision. Mere amendments may also be adopted during the course of such proceedings. But the main difficulty with petitioners' argument in this regard is that its acceptance could, as a practical matter, insulate the Legislature from any severe reform measures directed at that branch and initiated by the people, because proceedings to adopt constitutional revisions must be initiated by a two-thirds vote of both houses of the Legislature. (Cal. Const., art. XVIII, §§ 1, 2.) To hold that reform measures such as Proposition 140, which are directed at reforming the Legislature itself, can be initiated only with the Legislature's own consent and approval, could eliminate the only practical means the people possess to achieve reform of that branch. Such a result seems inconsistent with the fundamental provision of our Constitution placing "[a]ll political power" in the people. (Id., art. II, § 1.) As that latter provision also states, "Government is instituted for [the people's] protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Italics added.)

It seems indisputable that Proposition 140 represents an attempt by the people to "alter or reform" their own government. To construe article XVIII *512 as vesting the Legislature with a power to veto such reform measures would be seriously inconsistent with the democratic principles expressed in article II. If, as petitioners predict, Proposition 140 ultimately produces grave,

undesirable consequences to our governmental plan, the Legislature (Cal. Const., art. XVIII, § 1) or the people (id., art. XVIII, § 3) are empowered to propose a new constitutional amendment to correct the situation. Resolving, as we must, all doubts in favor of the initiative process, we conclude that nothing on the face of Proposition 140 effects a constitutional revision.

C. The Single-subject Requirement

[11] Petitioners next contend that Proposition 140 violates the single-subject provision (Cal. Const., art. II, § 8, subd. (d)), by combining in a single measure such "disparate" subjects as term and budgetary limitations and pension restrictions. We disagree.

The principles that guide our resolution of the issue are well settled: " '[A]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are "reasonably germane" to each other, and to the general purpose or object of the initiative. [Citations.]' " (Brosnahan v. Brown, supra, 32 Cal.3d at p. 245, 186 Cal.Rptr. 30, 651 P.2d 274; see also Raven v. Deukmejian, supra, 52 Cal.3d at p. 346, 276 Cal.Rptr. 326, 801 P.2d 1077, and cases cited.)

In the two foregoing cases, we upheld separate crime reform initiatives (Propositions 8 and 115) against single-subject challenges, even though each initiative contained widely disparate procedural and substantive provisions. We observed that the various elements of each of these initiatives united to form a comprehensive criminal justice reform package with one single unifying theme: promoting the rights of actual and potential crime victims. (See Raven v. Deukmejian, supra, 52 Cal.3d at p. 347, 276 Cal.Rptr. 326, 801 P.2d 1077; Brosnahan v. Brown, supra, 32 Cal.3d at p. 247, 186 Cal.Rptr. 30, 651 P.2d 274.)

In Brosnahan, we admonished that the single-subject rule "obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'" (32 Cal.3d at p. 253, 186 Cal.Rptr. 30, 651 P.2d 274.) We continued by referring to our "liberal interpretative tradition ... of sustaining statutes and initiatives which ***295 **1321 fairly

(Cite as: 54 Cal.3d 492, *512, 816 P.2d 1309, **1321, 286 Cal.Rptr. 283, ***295)

disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose." (Ibid.)

The unifying theme or common purpose of Proposition 140 is incumbency reform, a subject not excessively general when compared with prior measures upheld by this court. (See also *Fair Political Practices Com. v. *513 Superior Court* (1979) 25 Cal.3d 33, 43, 157 Cal.Rptr. 855, 599 P.2d 46 [reasonably germane subject of "political practices"]; *Amador, supra*, 22 Cal.3d at p. 231, 149 Cal.Rptr. 239, 583 P.2d 1281 [valid subject of "property tax relief"]; cf. *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1097, 1100, 240 Cal.Rptr. 569, 742 P.2d 1290 [invalid subjects of "fiscal affairs" and "statutory adjustments"].)

The present measure's introductory statement declares that an "extremely high number of incumbents" are reelected by reason of "The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense...." (Cal. Const., art. IV, § 1.5.) The declared purpose of Proposition 140 is "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office," by limiting "the powers of incumbency." (Ibid.)

Petitioners observe that Proposition 140 is broader than mere reform of the legislative branch, because the measure imposes term limitations on various constitutional officers as well as legislators. Moreover, petitioners dispute the idea that reducing or limiting legislators' pension rights could effectively assist in achieving incumbency reform. In their view, reducing state contributions to the Legislators' Retirement System would not eliminate any true advantage incumbents possess over challengers. Petitioners suggest the topic of pension reductions falls into the separate category or subject of "reducing expenditures."

[12] Petitioners appear to be confusing germaneness with functional relationship. As we have previously held, the single-subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship. (See *Brosnahan v. Brown, supra*, 32 Cal.3d at pp. 248-249, 186 Cal.Rptr. 30, 651 P.2d 274.) It is enough that the various provisions are reasonably

related to a common theme or purpose. (Id., at pp. 246-248, 186 Cal.Rptr. 30, 651 P.2d 274; see *Raven v. Deukmejian, supra*, 52 Cal.3d at pp. 347-348, 276 Cal.Rptr. 326, 801 P.2d 1077.)

The framers of Proposition 140 evidently believed that "the powers of incumbency" could be reduced or checked by making an extended career in public office both less available and less attractive to incumbent legislators, through term and budgetary limitations as well as reduced pension benefits. Budgetary reductions may have been deemed necessary to reduce the advantages incumbents possess vis-a-vis other candidates, as discussed in part D, post. As for limited pension benefits, the measure expressly states that the limitation was appropriate because service in the Legislature is no longer "intended as a career occupation." (Cal. Const., art. IV, § 4.5.) The framers presumably did not believe budgetary or pension limitations were needed *514 with respect to the other constitutional officers subject to the term limitations of the measure.

Whether or not these various provisions are wise or sensible, and will combine effectively to achieve their stated purpose, is not our concern in evaluating the present single-subject challenge. (See *Amador, supra*, 22 Cal.3d at p. 219, 149 Cal.Rptr. 239, 583 P.2d 1281 ["We do not consider or weigh the economic or social wisdom or general propriety of the [property tax] initiative. Rather, our sole function is to evaluate [the measure] legally in the light of established constitutional standards."]; see also *Calfarm Ins. Co. v. Deukmejian, supra*, 48 Cal.3d at pp. 841-842, 258 Cal.Rptr. 161, 771 P.2d 1247 [single-subject rule does not require determination whether each section effectively will further the measure's overall purpose]; *In re Lance W., supra*, 37 Cal.3d at p. 887, 210 Cal.Rptr. 631, 694 P.2d 744 [wisdom of Prop. 8 irrelevant to constitutional challenge]; ***296**1322 *Brosnahan v. Brown, supra*, 32 Cal.3d at p. 248, 186 Cal.Rptr. 30, 651 P.2d 274 [same].) Sensible or not, the separate aspects of Proposition 140 relate to the furtherance of a common purpose.

We conclude that the various provisions of Proposition 140 are reasonably germane to the single subject of incumbency reform.

D. Effect on Voting and Candidacy Rights

(Cite as: 54 Cal.3d 492, *514, 816 P.2d 1309, **1322, 286 Cal.Rptr. 283, ***296)

Petitioners next assert that the term limitations of Proposition 140 violate the First and Fourteenth Amendments of the federal Constitution. They observe that under Proposition 140, as previously discussed, once the prescribed maximum terms have expired, office holders are forever barred from running for the office they held. According to petitioners, this lifetime ban substantially burdens two fundamental rights, namely, the right to vote and the right to be a candidate for public office. Petitioners, urging "strict scrutiny" of the new measure, suggest that no "compelling state interest" supports such a lifetime ban. (See *Eu v. San Francisco Democratic Comm.* (1989) 489 U.S. 214, 222, 109 S.Ct. 1013, 1019, 103 L.Ed.2d 271 [hereafter *Eu*]; *Johnson v. Hamilton* (1975) 15 Cal.3d 461, 466-468, 125 Cal.Rptr. 129, 541 P.2d 881 [applying strict scrutiny to review constitutionality of candidates' durational residence requirement].)

Respondents, on the other hand, assert the measure is valid under the balancing test announced in *Anderson v. Celebrezze* (1983) 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547, discussed below. Respondents, noting certain mitigating aspects of the measure, contend that the public policy served by Proposition 140 is both rational and compelling, having only minimal effects on voting or candidacy rights. We first turn to the question of the proper standard for resolving petitioners' challenge.

*515 Because Proposition 140 amends the California Constitution itself, it is appropriate that we look to the decisions of the United States Supreme Court for guidance in determining the validity of the measure under the federal Constitution. We have observed that "[i]n analyzing constitutional challenges to election laws, this court has followed closely the analysis of the United States Supreme Court. [Citations.] ¶ The high court has generally addressed the validity of election regulations under the equal protection clause. However, the basis for the court's selection of that approach and the precise nature of the equal protection tests employed has not always been easily discernible. And, as is true for equal protection doctrine in general, the standard of review utilized in voting and election cases has been in a state of flux. [Citations.]" (*Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 710-711, 221 Cal.Rptr. 468, 710 P.2d 268; see also *Munro v. Socialist Workers Party*

(1986) 479 U.S. 189, 200-201, 107 S.Ct. 533, 540, 93 L.Ed.2d 499 [dis. opn. of Marshall, J., observing majority's failure to articulate appropriate level of scrutiny for appraising validity of restrictions on ballot access].)

[13] Petitioners assume that a "compelling interest" standard is required by *Eu*, supra, in which the justices unanimously invalidated California's prohibition on primary endorsements by political parties. To the contrary, it seems clear the high court in *Eu* imposed such a strict standard because of the serious impact on First Amendment freedoms of speech and association, interests not as directly impacted by Proposition 140, which does not affect speech interests and which impacts all political parties on an equal basis. (See 489 U.S. at pp. 222-225, 109 S.Ct. at pp. 1019-1021.) As *Eu* concluded, "Because the ban [on endorsements] burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest." (Id. at p. 225, 109 S.Ct. at p. 1021, fn. omitted.) Thus, *Eu* is probably inapposite. (See also *Clements v. Fashing* (1982) 457 U.S. 957, 963, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508 [plurality opinion stating barriers to candidate's access to ballot do not compel close scrutiny]; *Erum v. Cayetano* (9th Cir.1989) 881 F.2d 689, 692, fn. 7 [discussing *Eu*, but concluding that in cases ***297 **1323 involving restrictions on ballot access "heightened scrutiny is not the rule"].) In any event, as will appear, it is unlikely we would reach a different result applying strict scrutiny to evaluate Proposition 140.

In *Rodriguez v. Popular Democratic Party* (1982) 457 U.S. 1, 102 S.Ct. 2194, 72 L.Ed.2d 628, the court considered the constitutional validity of Puerto Rico's system of allowing only certain designated political parties access to the vote needed to fill legislative vacancies on an interim basis. In another unanimous opinion, the court noted that the federal Constitution does not specify the procedure a state must use in filling legislative *516 vacancies (id., at p. 8, 102 S.Ct. at p. 2199), that the Constitution does not compel a fixed method of choosing state or local officers or representatives (id., at p. 9, 102 S.Ct. at p. 2199), that the right to vote for state offices is not a constitutionally protected right (ibid.), but that once a state or commonwealth provides for elected representatives, a citizen has a

(Cite as: 54 Cal.3d 492, *516, 816 P.2d 1309, **1323, 286 Cal.Rptr. 283, ***297)

constitutional right to participate on an equal basis with other citizens (*id.*, at p. 10, 102 S.Ct. at p. 2200).

Rodriguez v. Popular Democratic Party, *supra*, 457 U.S. 1, 102 S.Ct. 2194, indicates the high court will give wide latitude to state election laws, even those that may restrict the electorate's choice of representatives, so long as those laws are applied in an even-handed manner without discriminating against particular citizens or classes of citizens. The incumbency limitations involved here satisfy that standard. (See also *Burdick v. Takushi* (9th Cir.1991) 927 F.2d 469, 473-474 [voters have no constitutional right to vote for particular candidate]; *Stiles v. Blunt* (8th Cir.1990) 912 F.2d 260, 266, *fn.* 10, *cert. den.* (1991) 499 U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2d 241 [same]; *Zielasko v. State of Ohio* (6th Cir.1989) 873 F.2d 957, 961 [same]; but see *Canaan v. Abdelnour*, *supra*, 40 Cal.3d at p. 713, 221 Cal.Rptr. 468, 710 P.2d 268.)

In *Canaan v. Abdelnour*, *supra*, 40 Cal.3d 703, 221 Cal.Rptr. 468, 710 P.2d 268, we struck down a city's blanket prohibition against write-in voting in municipal elections. In so doing, we applied the balancing test set forth in *Anderson v. Celebrezze*, *supra*, 460 U.S. 780, 103 S.Ct. 1564, wherein the court held unduly burdensome an Ohio law requiring independent candidates for the November 1980 Presidential Election to file their statements of candidacy by March of that year. The high court in *Anderson*, acknowledging that a state's regulatory interests in determining the eligibility of candidates "are generally sufficient to justify reasonable, nondiscriminatory restrictions" (*id.*, at p. 788, 103 S.Ct. at p. 1570, *fn.* omitted), announced the following test:

"Constitutional challenges to specific provisions of a State's election laws ... cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. [Citations.] Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only

determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [Citations.] The *517 results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.' [Citation.]" (460 U.S. at pp. 789-790, 103 S.Ct. at p. 1570.)

With respect to *Anderson's* requirement of showing the "necessity" of the particular burden imposed by the state, we must also consider whether there are any less drastic alternatives to a lifetime ban. (See *Anderson v. Celebrezze*, *supra*, 460 U.S. at p. 806, 103 S.Ct. at p. 1579; *Canaan v. Abdelnour*, *supra*, 40 Cal.3d 703, 719, *fn.* 13, 221 Cal.Rptr. 468, 710 P.2d 268.)

***298 **1324 Thus, *Anderson v. Celebrezze*, *supra*, 460 U.S. 780, 103 S.Ct. 1564, requires us to consider three separate elements in ascertaining the constitutionality of state laws restricting access to the ballot: (1) the nature of the injury to the rights affected, (2) the interests asserted by the state as justifications for that injury, and (3) the necessity for imposing the particular burden affecting the plaintiff's rights, rather than some less drastic alternatives. Lacking any more specific guidance from the high court, we now apply *Anderson's* balancing test to the challenged provisions of Proposition 140.

1. Character and Extent of Injury to Protected Rights

Two important rights are affected by Proposition 140, namely, the incumbent's right to run for public office, and the voters' right to reelect the incumbent to that office. Consequently, the "injury" to those rights resulting from the application of Proposition 140 is also twofold, namely, lifetime exclusion of the incumbent from the office previously held, and a corresponding permanent inability of the voters to return the incumbent to that office.

a. Effect on Candidates

As previously explained, Proposition 140 imposes a lifetime ban on legislators once they have completed

(Cite as: 54 Cal.3d 492, *517, 816 P.2d 1309, **1324, 286 Cal.Rptr. 283, ***298)

the maximum number of terms. Petitioners argue, "In the long run, the term limitations permanently ban those who are arguably the most qualified candidates—incumbents with the experience and expertise in the legislative process necessary to the most effective representation of their constituencies." According to petitioners, qualified incumbents will be "purged" solely to seat "massive numbers" of inexperienced "newcomers." Petitioners predict that only a few qualified persons will be attracted to short term public office.

Respondents, of course, dispute petitioners' premise that long-term legislators are inevitably better qualified than other candidates, and they believe that term limitations will encourage, rather than inhibit, new qualified *518 candidates seeking short term public service. They characterize the term limitations of Proposition 140 as additional candidacy requirements, akin to age, integrity, training or residency, which have generally been upheld. (See, e.g., *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 721, 94 Cal.Rptr. 602, 484 P.2d 578; 25 Am.Jur.2d, Elections, § 175, pp. 870- 871, and cases cited; Note, *Developments in the Law: Elections* (1975) 88 Harv.L.Rev. 1111, 1217 et seq.)

Respondents also stress three features of Proposition 140 that assertedly serve to mitigate the severity of its lifetime ban: First, the affected incumbent is not barred from seeking any other public office, including a seat in another legislative house or a statewide constitutional office. A former Senator may seek a seat in the Assembly, and vice versa. Second, the term limitations arise only after the incumbent already has had the opportunity to serve a significant period in office (i.e., eight years for a Senator, and six years for a member of the Assembly). Finally, the term limitations are generally applicable to persons elected or appointed on or after November 6, 1990. Except for some incumbent Senators, past terms served do not count in calculating the limitation. Thus, by the time the term limitations of Proposition 140 come into play, the incumbent will have already served, and indeed may continue to serve, several terms in public office.

b. Effect on Voters

Petitioners also stress the impact on the voters who

are prevented from casting their ballots for the particular candidate of their choice. Just as incumbent legislators are permanently barred from running for another term once they have served the prescribed numbers of terms, the voters are permanently barred from voting for such persons, at least for the legislative office they once held. According to petitioners, the voters thus will be denied the right to vote for those persons who arguably possess the best qualifications.

Additionally, petitioners note that because Proposition 140 was adopted on a statewide basis, "the disability [on candidates **1325 ***299 and voters] is imposed not by those who have the right to vote for the candidate, but rather by those outside the district." Petitioners thus suggest the resulting impact on or injury to the voters is aggravated or enhanced by reason of the ability of voters residing outside a particular voting district to essentially "veto" particular candidates within that district.

Respondents reply by citing federal court cases (e.g., *Burdick v. Takushi*, supra, 927 F.2d 469, 473-474) stating that voters have no constitutional right to vote for particular candidates. Additionally, respondents observe that the *519 challenged measure does not fall into any of the categories of prior cases in which the right to vote was found impermissibly infringed. No identifiable groups of voters are excluded from voting or otherwise unduly burdened in the exercise of their franchise. Characterizing the term limitations of Proposition 140 as additional candidacy qualifications akin to age or residency, respondents submit that Proposition 140 does not truly impair the franchise, for the voters retain the basic fundamental right to cast their ballots for the qualified candidate of their choice.

Moreover, respondents observe that neither voter choice nor candidate eligibility is restricted based on the content of protected expression, political affiliation, or inherently arbitrary factors such as race, religion or sex. The only criterion used is incumbency. Voters retain the ability to vote for any qualified candidate holding the beliefs or possessing the attributes they may desire in a public officeholder. Under these circumstances, First Amendment protection of political expression and promotion of the marketplace for ideas continue unabated.

(Cite as: 54 Cal.3d 492, *519, 816 P.2d 1309, **1325, 286 Cal.Rptr. 283, ***299)

Respondents further note that petitioners have cited no case supporting their theory that a voting restriction on "local" offices would be invalid if imposed by voters on a statewide basis. Indeed, such a rule would seemingly call in question any statewide legislation affecting the qualification of candidates for local elections, such as age or residency requirements.

Finally, respondents suggest that because Proposition 140 was an initiative measure adopted by the people at a statewide election, any resulting injury to the exercise of the franchise should be deemed self-inflicted, and thus not constitutionally protected.

c. Summary of Impact on Candidates and Voters

In sum, although Proposition 140 does affect the rights of voters and candidates to a degree, there are several mitigating aspects, including the voters' continued right to vote for any qualified candidates, as well as the candidates' ability to run for other public offices, their entitlement to a significant period of service in office before the term limitations apply, and the "prospective" application of the limitation provision. Additionally, we should bear in mind that it is presently unclear under federal law whether and to what extent voters retain a constitutional right to vote for particular candidates such as the incumbent legislators affected by the challenged measure. Thus, the legal impact of Proposition 140 on the voters remains uncertain.

Having discussed the extent of the "asserted injury to the rights protected" (*Anderson v. Celebrezze*, supra, 460 U.S. at p. 789, 103 S.Ct. at p. 1570), *520 we next analyze the "precise interests put forward by the State as justifications for the burden imposed by its rule" (*ibid.*).

2. The Interests of the State

[14] Balanced against the foregoing negative impact on candidates and voters flowing from the challenged measure are the considerable state interests assertedly promoted thereby. In the words of new article IV, section 1.5, of the state Constitution, term limitations are deemed necessary to restore "free, fair, and competitive elections," to "encourage qualified candidates to seek public office," and to eliminate "unfair incumbent

advantages" that have resulted in an "extremely high number of incumbents" and created "a class of career politicians" instead of the "citizen representatives envisioned by the Founding Fathers."

***300 **1326 According to respondents, the state's interests in limiting incumbency should support measures considerably stronger than a mere temporary disability from holding office. As respondents argue, the state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office, are both legitimate and compelling ones that support a lifetime ban from the office and outweigh any interest the incumbent legislators, or the voting public, may have in perpetuating the incumbents' positions of control.

The legitimacy of the foregoing asserted state interests in limiting incumbency are well recognized in analogous contexts. As stated by the West Virginia Supreme Court of Appeals in rejecting a similar challenge to a state constitutional amendment limiting the right of the Governor to seek a third consecutive term, "Constitutional restrictions circumscribing the ability of incumbents to succeed themselves appear in over twenty state constitutions, and exist in the Twenty-second Amendment to the Constitution of the United States with regard to the Presidency. The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure. [Citations and fn. omitted]." (*State ex rel. Maloney v. McCartney* (1976) 159 W.Va. 513, 223 S.E.2d 607, 611 [hereafter *Maloney*], app. dism. sub nom. *Moore v. McCartney* (1976) 425 U.S. 946, 96 S.Ct. 1689, 48 L.Ed.2d 190; see *Maddox v. Fortson* (1970) 226 Ga. 71, 172 S.E.2d 595, 598-599, cert. den. 397 U.S. 149, 90 S.Ct. 999, 25 L.Ed.2d 183; cf. *Chemerinsky, Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency* (1988) 49 Ohio St.L.J. 773 et seq.; *Tribe, American Constitutional Law* (2d ed. 1988) § 13-18, at p. 1097 ["Democracy envisions rule by successive temporary majorities. The capacity to displace *521 incumbents in favor of the representatives of a recently coalesced majority is, therefore, an essential attribute of the election

(Cite as: 54 Cal.3d 492, *521, 816 P.2d 1309, **1326, 286 Cal.Rptr. 283, ***300)

system in a democratic republic."]; cf. Annot. (1958) 59 A.L.R.2d 716 [construction and effect of incumbency limitation laws].)

The Maloney decision continues by describing at length the substantial reasons for limiting the right of incumbents to succeed themselves. These include "The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls," "fears of an entrenched political machine which could effectively foreclose access to the political process," and the belief that regularly disrupting those "machines" "would stimulate criticism within political parties" and "insure a meaningful, adversary, and competitive election." (223 S.E.2d at p. 611.)

In addition, Maloney explains that "it has long been felt that a limitation upon succession of incumbents removes the temptation to prostitute the government to the perpetuation of a particular administration. [Citation.] ... Meretricious policies which sacrifice the well-being of economic, social, racial, or geographic minorities are most likely where a political figure, political party, or political interest group can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine." (223 S.E.2d at pp. 611-612.)

Petitioners observe that Maloney involved a limitation on consecutive terms of a Governor, rather than a lifetime ban on incumbent legislators. They suggest that term limitations on the executive branch are justified by the need to check the substantial concentration of power that the chief executive possesses, a consideration assertedly not applicable to the legislative branch. But we think that many, if not all, of the considerations mentioned in Maloney (e.g., eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch.

In connection with petitioners' argument that Proposition 140's lifetime ban is unconstitutional, two other cases are instructive, ***301 **1327 though factually distinguishable. In *Clements v. Fashing*, supra, 457 U.S. 957, 102 S.Ct. 2836, cited with apparent approval in *Anderson v. Celebrezze*,

supra, 460 U.S. at page 789, footnote 9, 103 S.Ct. at page 1570, footnote 9, the high court upheld the validity of a Texas statute that rendered incumbent justices of the peace ineligible for the Texas Legislature. The disability from office extended only during the term for which the justices were elected or appointed. A plurality of the high court took the position that barriers to a candidate's access to the ballot do not *522 compel close scrutiny (457 U.S. at p. 963, 102 S.Ct. at p. 2843), and stressed the "de minimis" nature of the restriction, noting that the act merely imposed a brief "waiting period" on current officeholders, and therefore could be sustained by a mere showing of some "rational predicate" to support it (id. at pp. 967-968, 102 S.Ct. at pp. 2845-2846).

The *Clements v. Fashing* plurality did not affirmatively indicate that a lifetime bar to legislative service necessarily would be invalid. Significantly, unlike Proposition 140, the Texas act apparently was not aimed at limiting the powers of incumbency, but was based on the "rational predicate" that an affected justice will be less inclined to abuse his position or neglect his duties because of the justice's aspirations for higher office. (457 U.S. at p. 968, 102 S.Ct. at p. 2846.)

In *De Bottari v. Melendez* (1975) 44 Cal.App.3d 910, 119 Cal.Rptr. 256, the Court of Appeal struck down a local ordinance prohibiting recalled council members from running for city council within a year of the recall. Although petitioners believe the case supports their position, closer scrutiny indicates otherwise. Finding the candidacy restriction too severe, the *De Bottari* court observed, "Cases in other jurisdictions upholding limitations on successive terms in office [citations] involve similar restrictions but are not authoritative here since such limitations serve totally different governmental interests." (44 Cal.App.3d at p. 913, fn. 1, 119 Cal.Rptr. 256, italics added.) *De Bottari*, using strict scrutiny, reviewed the interests that assertedly supported a temporary ban on candidacy by recalled candidates and found them insufficient to sustain the restriction. The court had no occasion to review the "different" interests served by general limitations on incumbency, as outlined by Maloney, supra.

In sum, despite its distinguishing features, we conclude that Maloney's, supra, 223 S.E.2d 607, analysis is quite pertinent to our determination

whether permanent incumbency limitations are supported by legitimate and compelling considerations. We conclude they are so supported.

3. Necessity of Imposing Restrictions

[15] We turn next to the "necessity" of imposing the restrictions of Proposition 140 on the dual rights at issue here (see *Anderson v. Celebrezze*, supra, 460 U.S. at pp. 789-790, 103 S.Ct. at pp. 1570-1571). Petitioners contend that a lifetime ban on candidacy was unnecessary, and that other less "drastic" alternatives, such as a limitation on consecutive terms, together with additional restrictions on campaign contributions to legislators, decreased fringe and pension benefits, and additional incentives for early retirement, would *523 have been sufficient to promote and accomplish the state interests previously discussed.

As will appear, we conclude that the less drastic alternatives suggested by petitioners would have been inadequate to accomplish the declared purpose of Proposition 140 to eliminate the "class of career politicians" that assertedly had been created by virtue of the "unfair incumbent advantages" referred to in that measure. (Cal. Const., art. IV, § 1.5.)

Respondents stress the substantial advantages incumbent legislators enjoy in this state, advantages that permitted 92 percent of all incumbents to win reelection at this state's November 1990 General Election. Indeed, respondents note that nine of these incumbents ran unopposed.

Respondents seem correct in this regard. Whether by reason of superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors, ***302 **1328 incumbents do indeed appear to enjoy considerable advantages over other candidates. (See *Service Employees v. Fair Political Practices* (E.D.Cal.1990) 747 F.Supp. 580, 588; *Watson v. Fair Political Practices Com.* (1990) 217 Cal.App.3d 1059, 1074, & fn. 13, 266 Cal.Rptr. 408.) As Proposition 140's introductory statement indicates, the framers of the measure believed these substantial advantages of incumbency were unfair to other candidates and tended to create "a class of career politicians, instead of the citizen representatives envisioned by the Founding

Fathers." (Cal. Const., art. IV, § 1.5.)

Petitioners suggest that a more reasonable alternative existed to the measure's lifetime ban: disqualification of the incumbent for the forthcoming term, thus "forcing the legislator to take one term off, before being eligible to run for the body." Yet, as respondents observe, the framers reasonably could conclude that a lifetime ban was necessary to assure that a former office holder could not reinvoké at least some of the advantages of incumbency to gain reelection after leaving office for a term or more.

Additionally, we believe the framers might well have reasonably concluded that a mere ban on consecutive terms could encourage popular "career politicians" to trade terms with each other, or to attempt to arrange for a "caretaker" candidate, such as a spouse or relative, to hold office for them during the interrupted term. For example, when in 1966 George Wallace became legally ineligible to run for reelection as Governor of Alabama because of state term limitations applicable to that office, his wife Lurleen successfully ran in his place, and served as Governor until her death in 1968. George Wallace was reelected as Governor in 1970 and again in *524 1974. (See 12 *The New Encyclopedia Britannica*, Micropaedia (15th ed. 1990) Wallace, George C. at p. 467.)

Realistically, only a lifetime ban could protect against various kinds of continued exploitation of the "advantages of incumbency" captured through past terms in office. The remainder of petitioners' suggested "alternatives" essentially involve narrow changes in the system of providing contributions or compensation for legislators, changes that would afford "career politicians" with independent resources little incentive to voluntarily terminate public service.

4. Conclusion

On balance, we conclude the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them. As Maloney observed (223 S.E.2d at p. 612), no decisions of the United States Supreme Court have been found that suggest a limitation on incumbency would be unconstitutional. Although such limitations may restrict the franchise (but see

(Cite as: 54 Cal.3d 492, *524, 816 P.2d 1309, **1328, 286 Cal.Rptr. 283, ***302)

cases indicating voters have no right to vote for particular candidates, e.g., *Burdick v. Takushi*, supra, 927 F.2d 469, 473-474), if we use a balancing test that weighs "the enlargement of the franchise by guaranteeing competitive primary and general elections" against "incidental disenfranchisement" of some voters, the court "must conclude that restrictive provisions on the succession of incumbents do[] not frustrate but rather further[] the policy of the Fourteenth Amendment." (Maloney, supra, 223 S.E.2d at pp. 612-613.)

It is true, as petitioners observe, that respondents have not offered evidence to support all of the various premises on which Proposition 140 is based. But as the United States Supreme Court pointed out in *Munro v. Socialist Workers Party*, supra, 479 U.S. 189, 107 S.Ct. 533, upholding state restrictions on minority party candidacy, a state need not demonstrate empirically all of the various evils that its regulations seek to combat: "Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." (Id., at pp. 195-196, 107 S.Ct. ***303 **1329 at pp. 537-538.) We have no reason to doubt that the high court would give similar leeway to state regulations imposed directly by the people through the initiative process.

In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and *525 "encourag[ing] qualified candidates to seek public office" (Cal. Const., art. IV, § 1.5), is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency.

E. Bill of Attainder

[16] Petitioners next assert that Proposition 140 is, in effect, an unlawful bill of attainder. (See U.S. Const., art. I, § 10 ["No state shall ... pass any bill

of attainder...."].) They contend that although the legislative term, budgetary, and pension limitations of Proposition 140 are facially applicable to all current and future incumbent legislators, the measure was nonetheless intended to punish or penalize the current group of incumbent legislators, and especially such long-term incumbents as Assemblyman Willie Brown (elected in 1964), and Senator David Roberti (elected in 1971).

A bill of attainder has been defined as a "legislative punishment, of any form or severity, of specifically designated persons or groups" (*United States v. Brown* (1965) 381 U.S. 437, 447, 85 S.Ct. 1707, 1714, 14 L.Ed.2d 484 [federal law forbidding Communist Party members from serving as union officers], *italics added*), or a "legislative act[].... that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial" (*United States v. Lovett* (1946) 328 U.S. 303, 315, 66 S.Ct. 1073, 1078, 90 L.Ed. 1252 [federal legislation terminating compensation for certain federal employees accused of subversive activities], *italics added*). (See also *Selective Serv. Sys. v. Minn. Public Int. Res. Gp.* (1984) 468 U.S. 841, 851, 104 S.Ct. 3348, 3354, 82 L.Ed.2d 632 [bills of attainder involve punitive action aimed at identifiable person or group]; *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 474, 97 S.Ct. 2777, 2806, 53 L.Ed.2d 867; *Cummings v. Missouri* (1866) 71 (4 Wall.) U.S. 277, 320, 18 L.Ed. 356 ["disqualification from office may be punishment" amounting to an improper bill of attainder]; *Crain v. City of Mountain Home* (8th Cir.1979) 611 F.2d 726, 729 [invalidating city ordinances that removed city attorney from office for remainder of term, reduced future salary for the office, and prohibited private practice by such officers]; *Connecticut Judicial Selection Com'n v. Larson* (D.Conn.1989) 745 F.Supp. 88, 94-96 [upholding act shortening terms of incumbent nonattorney members of judicial selection committee].)

Petitioners point to the following language in the ballot arguments by the measure's proponents: "Proposition 140 will end the reign of the Legislature's powerful officers--the Assembly Speaker (first elected a *526 quarter of a century ago) and the Senate Leader (now into his third decade in the Legislature)...." (Ballot Pamp.,

(Cite as: 54 Cal.3d 492, *526, 816 P.2d 1309, **1329, 286 Cal.Rptr. 283, ***303)

supra, at p. 70.) According to petitioners, the foregoing language (together with more explicit references to Brown and Roberti in the proponents' campaign literature) makes it clear that Proposition 140 was directed at punishing such long-term legislators as Brown and Roberti, and that accordingly the measure must be deemed an improper bill of attainder under the foregoing cases.

We conclude that petitioners' argument should be rejected. As the high court explained in *Nixon v. Administrator of General Services*, supra, 433 U.S. 425, 97 S.Ct. 2777, in determining whether particular legislation constitutes a bill of attainder, courts have applied three different tests. We believe the challenged measure meets none of them.

First, an "historical" test has been used to determine whether the subject legislation imposes a kind of punishment traditionally deemed prohibited by the federal ***304 **1330 Constitution. (433 U.S. at p. 475, 97 S.Ct. at p. 2806.) Second, the courts have used a "functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. [Citations.]" (Id., at pp. 475-476, 97 S.Ct. at pp. 2806-2807, italics added and fn. omitted.) Finally, the courts have used a "motivational" test, "inquiring whether the legislative record evinces a congressional intent to punish. [Citations.]" (Id., at p. 478, 97 S.Ct. at p. 2808.)

Petitioners appear to concede that the historical test is inapplicable here, and we have found no cases involving term limitations as a form of "punishment." As for the functional test, the measure itself expresses broad, nonpunitive purposes, namely, "[t]o restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office" by limiting "the powers of incumbency." (Cal. Const., art. IV, § 1.5.)

Although petitioners point to the "self-serving" nature of these declarations of intent, we have no reason to dispute the accuracy of their description of the measure's primary intent. As in *Nixon v. Administrator of General Services*, supra, 433 U.S. at page 477, 97 S.Ct. at page 2807, "Evaluated in terms of these [express congressional] asserted

purposes, the law plainly must be held to be an act of nonpunitive legislative policymaking." (Italics added.)

Petitioners rely primarily on the motivational test, stressing the framers' express intent to dislodge such long-term incumbents as Brown and Roberti. Petitioners cite the ballot pamphlet arguments of the measure's proponents, which describe these legislators 'in unflattering terms ("legislative dictators" *527 participating in "Sacramento's web of special favors and patronage"), and urge passage of the measure as a means of ending their long incumbency.

But the ballot arguments contain no indication of an intent to punish those individuals for any particular past misconduct. Broad reform measures are frequently prompted by particular acts or circumstances involving specific individuals, but in our view such measures would not constitute improper bills of attainder unless an intent to punish such individuals clearly appears from their face, or from the circumstances surrounding their passage.

As stated in *Connecticut Judicial Selection Com'n v. Larson*, supra, 745 F.Supp. at page 96, quoting from an earlier case, " '[i]t is clear that general legislation such as this ... aimed at the office ... rather than the incumbent office holders, has none of the objectionable attributes of a bill of attainder.' [Citation.]" (Italics added.) Proposition 140 applies with equal force to all state legislators, current and future. Although it is unquestionable the proponents sought to limit the terms of incumbent legislators, including such long-term legislators as Brown and Roberti, we find no evidence of an intent to single out and punish those individuals for any supposed misconduct on their part. Accordingly, we conclude that Proposition 140 does not constitute a bill of attainder under the federal Constitution.

F. Impairment of Contracts

Finally, petitioners maintain that Proposition 140's limitations on the pension rights of incumbent legislators is unconstitutional as an invalid impairment of contract under the federal Constitution. (U.S. Const., art. I, § 10 ["No State shall ... pass any ... Law impairing the Obligation of Contracts...."].)

(Cite as: 54 Cal.3d 492, *527, 816 P.2d 1309, **1330, 286 Cal.Rptr. 283, ***304)

As previously indicated, new section 4.5 is added to article IV of the state Constitution to provide that although the state will contribute the employer's share to the federal Social Security program on behalf of participating legislators "elected to or serving in the Legislature on or after November 1, 1990," nonetheless "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation."

This same provision further provides that "This Section shall not be construed to abrogate or diminish any vested pension or ***305 **1331 retirement benefit which may have accrued under an existing law ..., but upon adoption of *528 this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than [federal] Social Security...."

Petitioners assert that, as to incumbent legislators continuing to serve on or after November 6, 1990 (either by reelection to a new term or continuation of a prior term), Proposition 140 constitutes an improper impairment of their "vested" contractual or statutory right to continued participation in the pension program administered by the Legislators' Retirement System (LRS). (See Gov.Code, § 9350 et seq.) In petitioners' view, supported by respondent PERS, incumbent legislators who were members of the LRS immediately prior to November 6, 1990, are entitled to continue to earn pension benefits so long as they remain otherwise qualified to receive such benefits through continued state service. Petitioners (not joined in this respect by PERS) assert similar contract claims on behalf of nonincumbent legislators newly elected on November 6.

1. Incumbent Legislators

Petitioners find ample support for their position in California cases confirming that both the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment. (See *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120, 124, 192 Cal.Rptr. 762, 665 P.2d 534 [legislators]; *Olson v. Cory* (1980) 27 Cal.3d 532, 540-541, 178 Cal.Rptr. 568, 636 P.2d 532 [judges]; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863-864, 148 Cal.Rptr. 158, 582 P.2d 614 [state

Treasurer]; *Miller v. State of California* (1977) 18 Cal.3d 808, 814-817, 135 Cal.Rptr. 386, 557 P.2d 970 [public employees]; see also *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131, 287 P.2d 765 [same]; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853, 179 P.2d 799 [same].)

Petitioners (joined by respondent PERS) argue that when incumbent legislators first assumed office, they were impliedly promised pension benefits substantially equivalent to those offered by the then-existing provisions of the LRS, and that these benefits included both the primary right to receive any vested pension benefits upon retirement (see *City of Long Beach v. Allen* (1956) 143 Cal.App.2d 35, 38-39, 300 P.2d 356), as well as the collateral right to earn future pension benefits through continued service, on terms substantially equivalent to those then offered (see *Carman v. Alvord* (1982) 31 Cal.3d 318, 325, 182 Cal.Rptr. 506, 644 P.2d 192). Although Proposition 140 by its terms assures that incumbent legislators' right to receive vested pension benefits will not be lost or diminished, the measure also purports to terminate their collateral right to accrue additional benefits through further contributions and continued service to the state.

*529 According to petitioners, the applicable principle is set forth in *Miller v. State of California*, supra, 18 Cal.3d at page 817, 135 Cal.Rptr. 386, 557 P.2d 970: "[U]pon acceptance of public employment plaintiff acquired a vested right to a pension based on the system then in effect. That system allowed him to earn successively higher levels of benefits based on his years of service and his highest average salary during three consecutive years." (See also *Olson v. Cory*, supra, 27 Cal.3d at p. 541, 178 Cal.Rptr. 568, 636 P.2d 532; *Betts v. Board of Administration*, supra, 21 Cal.3d at p. 863, 148 Cal.Rptr. 158, 582 P.2d 614; *Kern v. City of Long Beach*, supra, 29 Cal.2d at pp. 855-856, 179 P.2d 799.) Similar increased benefits from continued service were provided legislators under the LRS. (See Gov.Code, § 9350.)

[17] In response to petitioners' assertions, respondent Eu and intervener first contend that incumbent legislators do not have a vested right under the LRS to continue to accrue pension benefits through continued service. In this regard, they suggest that article IV, section 4, of the state Constitution precludes legislators from acquiring any

vested right to continue to earn pension benefits. We disagree.

Article IV, section 4 of the State Constitution, provides in pertinent part that "The ***306 **1332 Legislature may, prior to their retirement, limit the retirement benefits payable to Members of the Legislature...." (Italics added.) That provision, seemingly empowering the Legislature to exercise some measure of control over the pension rights of its own members prior to their retirement, may create some uncertainty as to the full amount or extent of a legislator's pension rights during his term of office. But the provision neither states nor implies that these rights are thus deemed inchoate and unprotected from impairment by the initiative process. Significantly, we have never suggested that the mere existence of article IV, section 4, precludes legislators from acquiring pension rights protected by the state or federal contract clauses. (Cf. *Allen v. Board of Administration*, supra, 34 Cal.3d at pp. 119-120, 192 Cal.Rptr. 762, 665 P.2d 534.)

Petitioners acknowledge that the state as employer is permitted to make reasonable modifications to the pension system during the employment relationship, so long as employees receive "comparable new advantages" in return for any substantial reduction in benefits. (*Olson v. Cory*, supra, 27 Cal.3d at p. 541, 178 Cal.Rptr. 568, 636 P.2d 532; *Betts v. Board of Administration*, supra, 21 Cal.3d at p. 864, 148 Cal.Rptr. 158, 582 P.2d 614; *Allen v. City of Long Beach*, supra, 45 Cal.2d at p. 131, 287 P.2d 765.) As we stated in *Olson*, "Although an employee does not obtain any 'absolute right to fixed or specific benefits ... there [are] strict limitation[s] on the conditions which may modify the pension system in effect during employment.' [Citation.] Such modifications must be reasonable and any 'changes in a pension plan *530 which result in disadvantage to employees should be accompanied by comparable new advantages.' " [Citation.] (27 Cal.3d at p. 541, 178 Cal.Rptr. 568, 636 P.2d 532.)

Petitioners correctly observe that the pension provisions of Proposition 140 do not merely modify the LRS pension system; rather they terminate that system entirely as to additional benefits accruing for future services. Intervener argues that the "transfer" or "redirection" of pension funds to the federal Social Security system operates as a "comparable new advantage" which justifies the

impairment and consequently sustains the measure. Petitioners respond by asserting that every legislator already possessed the right to join the federal Social Security system, that 99 out of 120 legislators were already contributing to that system when Proposition 140 was adopted, and that the anticipated federal benefits will be far less than those provided by the LRS. Neither respondent Eu nor intervener has disputed those allegations.

[18] We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service, despite the potential but unexercised limitations contemplated by article IV, section 4, of the state Constitution. We also conclude that the pension restriction of Proposition 140 must be deemed an impairment, not a mere "modification" or "adjustment," of the vested pension rights of incumbent legislators.

Respondent Eu and intervener next argue that, assuming an incumbent legislator may acquire such vested rights, a different rule should apply to incumbent legislators who commenced new terms after Proposition 140 became effective. They rely primarily on our decision in *Olson v. Cory*, supra, 27 Cal.3d 532, 178 Cal.Rptr. 568, 636 P.2d 532, which had upheld a statute limiting certain cost-of-living increases in judges' salaries after they commenced new terms of office. As *Olson* held, "A judge who completes one term during which he was entitled to unlimited cost-of-living increases and elects to enter a new term has impliedly agreed to be bound by salary benefits then offered by the state for the different term." (27 Cal.3d at p. 540, 178 Cal.Rptr. 568, 636 P.2d 532.) Similarly, it is argued, incumbent legislators commencing new terms on or after November 6, 1990, have impliedly agreed to serve under the conditions mandated by the new measure.

[19] Petitioners and respondent PERS contend, however, that pension rights fall into a different category than salary rights. Although a state officer may have no protectible ***1333 ***307 right to continuation of his former salary from term to term, nonetheless on commencing to serve the state the officer thereupon acquires a vested right to earn, through continued service, additional pension benefits in an amount reasonably comparable to those available when he or she first took office. According to petitioners, that right is not

(Cite as: 54 Cal.3d 492, *531, 816 P.2d 1309, **1333 , 286 Cal.Rptr. 283, ***306)

extinguished *531 when one term of office ends and another commences. (See *In re Marriage of Alarcon* (1983) 149 Cal.App.3d 544, 552- 553, 196 Cal.Rptr. 887 [hereafter *Alarcon*].) To hold otherwise, petitioners argue, could unduly penalize public officers who serve elective or appointive terms.

We agree with petitioners. It would be anomalous to hold that a legislator's supposedly "vested" right to acquire a reasonable pension is subject to absolute divesting at the conclusion of the period comprising his or her immediate term of office (assuming no right to receive actual benefits has yet accrued). Under such a holding, a legislator could entirely lose future pension benefits on the very eve of entitlement thereto.

The state, in adopting the LRS, elected to treat legislators in a manner similar to other state employees, providing them with a plan whereby pension benefits could be acquired through continued service beyond their initial term of office. Having done so, the state cannot thereafter abandon that plan as to incumbent legislators without providing them comparable new benefits.

As stated in *Alarcon*, "The state's obligation to pay a specific salary extends to the end of each term of office. There is no promise express or implied the state will continue to pay an existing salary beyond the end of a term. Thus, no contractual rights are impaired if different salary or cost of living differentials are payable during and for a future term. [¶] A pension, however, is different from a salary. A right to pension benefits provided by the state payable upon fulfillment of age, service and other requirements may not be destroyed, once vested, without impairment of the state's contractual obligation. [Citations.]" (149 Cal.App.3d at p. 552, 196 Cal.Rptr. 887.)

Alarcon is factually distinguishable, for in that case the affected officer (a state judge who later accepted a federal judgeship) had already acquired a vested, though deferred, right under state law to a full pension prior to the enactment of the challenged restriction on pension benefits for persons accepting federal positions. Under such circumstances, the fact the judge served additional terms as a state judge following the adoption of that restriction could not defeat his previously vested pension rights.

Nonetheless, the principle of *Alarcon* seems controlling here. In the present case, incumbent legislators acquired a vested right to earn increased pension benefits in return for continued service. By analogy to *Alarcon*, their commencement of a new term following adoption of the pension restriction of Proposition 140 would not defeat that vested right.

Alarcon further observed that although vested pension rights could be modified before retirement "to keep a pension system flexible and permit *532 adjustments to accord with changing conditions, such modifications must be reasonable and may not destroy or impair a vested contractual right to a pension. [Citations.]" (149 Cal.App.3d at p. 553, 196 Cal.Rptr. 887.) As we have previously discussed, the pension provisions of Proposition 140, which abruptly terminate an incumbent legislator's right to earn future pension benefits through continued service, must be deemed an impairment, not a mere "modification" or "adjustment," of the vested pension rights of incumbent legislators, whether or not they will enter a new term on or after November 6, 1990.

Thus, we hold that, under California law, all incumbent legislators acquired a vested right to earn additional pension benefits through continued service, a right which Proposition 140 clearly impairs.

After granting review in this case, we asked for further briefing on the additional question whether the contract clause of the federal Constitution protects the salary or ***308 **1334 pension rights of state public officials such as legislators. (See, e.g., *Higginbotham v. Baton Rouge* (1939) 306 U.S. 535, 538-539, 59 S.Ct. 705, 706-707, 83 L.Ed. 968, reh'g. den. 307 U.S. 649, 59 S.Ct. 831, 83 L.Ed. 1529 [hereafter *Higginbotham*]; *Dodge v. Board of Education* (1937) 302 U.S. 74, 78-79, 58 S.Ct. 98, 100, 82 L.Ed. 57; *Crenshaw v. United States* (1890) 134 U.S. 99, 105-106, 10 S.Ct. 431, 433, 33 L.Ed. 825; *Butler v. Pennsylvania* (1850) 51 U.S. (10 How.) 402, 416-418, 13 L.Ed. 472.)

In *Higginbotham*, supra, a public officer (commissioner of public parks) was discharged in the middle of his term and sued to recover the balance of his salary for the stated term, asserting a federal contracts clause claim. The high court, in a

brief, unanimous opinion (citing earlier cases), denied relief, holding that the contract clause does not protect the tenure assigned to a state's public officers. The court relied on the "familiar principle that 'the legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.'" [Citations.] (306 U.S. at p. 538, 59 S.Ct. at p. 706.)

The *Higginbotham*, supra, 306 U.S. 535, 59 S.Ct. 705, principle, though stated in terms of "tenure," extends to matters of compensation of public officers. As stated in *Dodge v. Board of Education*, supra, 302 U.S. at pages 78-79, 58 S.Ct. at page 100, cited with approval in *Higginbotham*, state legislation fixing the compensation of public officers "creates no contract in their favor and the compensation named may be altered at the will of the legislature." (See also *Crenshaw v. United States*, supra, 134 U.S. at p. 105, 10 S.Ct. at p. 433 *533 [compensation paid to state public officers is not protected by federal contract clause].)

[20] The applicable principle to be gleaned from *Higginbotham*, supra, 306 U.S. 535, 59 S.Ct. 705, appears to be that a state (or its local subdivisions) has the power at any time to create, alter or abolish state or local public offices, and thereby reduce the affected officers' salaries or other compensation, unfettered by federal contract clause restrictions. Respondent Eu and intervenor argue that if, under *Higginbotham*, a state can terminate a public officer in the midst of his or her term without providing compensation for the remainder thereof, then it would follow that the state likewise can terminate future contributions toward his or her pension, assuming state statutory and constitutional guaranties are satisfied. But as petitioners observe, none of these high court cases involved the special area of vested pension rights, or concerned the rights of persons remaining in office for additional terms.

Although the issue is not entirely free of doubt, we conclude that the foregoing federal cases would not withhold federal contract clause protection from incumbent state legislators who have acquired vested pension rights under state law.

Higginbotham involved the tenure of public officials

and the consequences arising from prematurely terminating that tenure. The case did not concern the quite distinct matter of the pension rights of public officials or employees. As we explained in *Miller*, although the Legislature may reduce the tenure of a public employee's position, and thereby shorten his state service, public employee pension rights involve constitutionally protected obligations. "Pension rights, unlike tenure of civil service employment, are deferred compensation earned immediately upon the performance of services for a public employer '[and] cannot be destroyed ... without impairing a contractual obligation....' [Citation.]" (18 Cal.3d at p. 814, 135 Cal.Rptr. 386, 557 P.2d 970.)

Decisions of this court have assumed the federal contract clause protects the vested pension rights of public officers. Olson and Betts, both supra, involved public officers (a state court judge and a state constitutional officer, respectively), and those cases concluded, without discussion of the *Higginbotham/Dodge* line of decisions, that the federal contract clause would apply to such persons. (See also *Allen v. Board of Administration*, supra, 34 ***309 **1335 Cal.3d at p. 119, 192 Cal.Rptr. 762, 665 P.2d 534.)

In *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 76 Cal.Rptr. 869, appeal dismissed 396 U.S. 274, 90 S.Ct. 564, 24 L.Ed.2d 465, a case likewise involving the rights of a state public official, the Court of Appeal *534 acknowledged the federal rule limiting federal contract clause protection for discharged state public officers (citing *Dodge v. Board of Education*, supra, 302 U.S. 74, 58 S.Ct. 98), and further observed that the public employee pension decisions of this court (e.g., *Kern v. City of Long Beach*, supra, 29 Cal.2d 848, 179 P.2d 799) "plac[ed] earned retirement rights within the shelter of the prohibition against contract impairment, without specific citation of either the federal or state clauses." (271 Cal.App.2d at p. 781, 76 Cal.Rptr. 869.) The Lyon court nonetheless concluded, "Certainly the California pension decisions have never rejected the federal clause as a source of protection. It is now too late to do so. California law places earned pension rights of public officers and employees under the protection of the contract clause regardless of any characterization adopted by the federal courts." (*Ibid.*, italics added.)

(Cite as: 54 Cal.3d 492, *534, 816 P.2d 1309, **1335, 286 Cal.Rptr. 283, ***309)

We agree with *Lyon v. Flournoy*, supra, 271 Cal.App.2d 774, 76 Cal.Rptr. 869, that, in light of prior California decisions consistently extending federal contract clause protection to state public officers, it is simply "too late" to retreat from the clear implication of those holdings. We conclude that the pension restrictions of Proposition 140 are unconstitutional under the federal contract clause as applied to incumbent legislators because they infringe on the vested pension rights of those persons.

2. Nonincumbent Legislators

[21] As for nonincumbent legislators first assuming office after Proposition 140 became effective, it seems clear they acquired no vested or protectible right to a continuation of the pension system in operation prior to their employment and, accordingly, the measure properly may be applied to them. (See *Allen v. Board of Administration*, supra, 34 Cal.3d at p. 124, 192 Cal.Rptr. 762, 665 P.2d 534.) Petitioners offer no argument or authorities suggesting a contrary rule as to such persons.

3. Severability

[22] Although a portion of Proposition 140 is invalid as applied to incumbent legislators, its invalidity does not affect the remaining provisions of the measure, for those provisions can be given effect without regard to the validity or operation of the invalid pension restrictions.

[23] Although the drafters of Proposition 140 included a severance clause (section 11 of the measure), by its terms it pertains only to the subject matter of article VII, section 11, of the state Constitution (regarding the obligations of the LRS) rather than to the entire initiative measure. It is possible the framers intended to apply the severance clause to the entire measure, as the clause referred to "this measure" and was placed at the conclusion of the *535 substantive provisions of Proposition 140. But in any event, it is clear that severance of particular provisions is permissible despite the absence of a formal severance clause. (See, e.g., *People v. Mirmirani* (1981) 30 Cal.3d 375, 387, fn. 9, 178 Cal.Rptr. 792, 636 P.2d 1130.)

As we stated in *Raven v. Deukmejian*, supra, 52 Cal.3d at pages 355- 356, 276 Cal.Rptr. 326, 801

P.2d 1077, quoting from an earlier case, "[t]he cases prescribe three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable. [Citations.]" In *Raven*, we invalidated a portion of Proposition 115 (an initiative pertaining to the rights of criminal defendants), but preserved the remainder, relying on the foregoing criteria for severability. The present measure likewise satisfies each of those criteria.

First, the invalid pension restriction, contained in new section 4.5 of article IV of the state Constitution, can be grammatically severed without affecting the operation of the remaining clauses. In order to preserve the section's application to nonincumbent **1336 ***310 legislators, such severance would involve (1) striking from that section the words "or serving in," so that the section applies only to "a person elected to the Legislature on or after November 1, 1990," and (2) construing the resulting language as applicable only to nonincumbent legislators first elected to the Legislature on or after that date. (See *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 266-267, 284 Cal.Rptr. 718, 814 P.2d 704.)

Second, the invalid restriction is functionally severable, as its removal would not affect the function or operation of the remaining provisions. The term and budgetary limitations, together with the restriction on nonincumbent legislators' pension rights, can operate entirely independently of the invalid restriction.

Finally, the invalid portion of the measure is volitionally severable, in that the framers and voters undoubtedly would have adopted the remaining provisions had they foreseen the success of petitioners' challenge. The framers included language preserving any "vested" rights which may have accrued, disclosing an intent to accommodate any interests protected by federal contract clause principles. As for the voters, there is no indication they placed undue emphasis on the pension rights provision as it applied to incumbent legislators.

III. CONCLUSION

We conclude that, except for the restriction on pensions of incumbent legislators, Proposition 140 is

(Cite as: 54 Cal.3d 492, *536, 816 P.2d 1309, **1336, 286 Cal.Rptr. 283, ***310)

constitutionally valid. The petition for a *536 peremptory writ of mandate is granted to the extent it seeks to compel respondents to refrain from enforcing section 4 of Proposition 140 as applied to incumbent legislators. In all other respects, the petition for mandate is denied. The temporary stay issued on June 14, 1991, is vacated. The parties should bear their own costs. (See *Raven v. Deukmejian*, supra, 52 Cal.3d at p. 356, 276 Cal.Rptr. 326, 801 P.2d 1077.)

PANELLI, KENNARD, ARABIAN, BAXTER and GEORGE, JJ., concur.

MOSK, Justice, concurring and dissenting.

I concur in the judgment insofar as it invalidates Proposition 140's purported restrictions on the retirement benefits of incumbent legislators.

Otherwise, I dissent.

In this case, we are presented with a broad challenge to Proposition 140--the promotionally self-styled "Political Reform Act of 1990"--under both the United States and California Constitutions. As will appear, the attack is successful on at least two separate and independent points: the initiative violates the single-subject rule of the state charter and also amounts to an unconstitutional revision of that instrument.

I. Proposition 140 and the Single-subject Rule

Beyond any doubt, Proposition 140 violates the single-subject rule on its face and, as a result, is invalid: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." (Cal. Const., art. II, § 8, subd. (d).)

At the outset, I must observe that "The initiative process is out of control in California. Voters are often unable to comprehend all that an initiative measure proposes to accomplish, and they are often asked to vote on a multitude of issues by casting a single ballot." (Note, Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California (1991) 24 U.C. Davis L.Rev. 879, 929 (hereafter Note).) Much, of course, is at stake. The inference is compelled by a consideration of the staggering costs of initiative

campaigns. For example, in 1988 proponents and opponents spent more than \$130 million in attempting to persuade the voters of the merits of their respective positions. (Id. at p. 889, fn. 55.)

Regrettably, I must also observe that in large part, the blame for this chaos must be laid to the court. "One way" to prevent such a situation "is by limiting measures to ***311 **1337 a single subject." (Note, supra, 24 U.C. Davis L.Rev. at *537 pp. 929-930.) Such a means is available: the single-subject rule--which was designed to simplify and clarify initiatives (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 2, 1948), pt. I, argument in favor of Prop. 10, p. 8)--"is already part of the California Constitution...." (Note, supra, 24 U.C. Davis L.Rev. at pp. 929-930.) But it is now notorious--and irresponsible--that "the California Supreme Court is reluctant to enforce it. In over forty years, the court has never invalidated an initiative measure for violating the single-subject rule." (Id. at p. 896, italics added.) It is also notorious--and irresponsible--that the court not only "avoid[s] invalidating initiatives under the single-subject rule," but also "avoid[s] altogether a meaningful application of the rule." (Id. at p. 899.)

I return to Proposition 140. In my concurring and dissenting opinion in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 276 Cal.Rptr. 326, 801 P.2d 1077, I discussed the single-subject rule at length with regard to Proposition 115 and its 31 sections. (52 Cal.3d at pp. 357-364, 276 Cal.Rptr. 326, 801 P.2d 1077 [conc. & dis. opn. of Mosk, J.].) The substance of that discussion was this: "... [T]he single-subject rule requires an initiative measure to constitute a coherent enactment in and of itself. It is not enough for such a measure to be capable of bearing some label of indefinite scope. It follows that the 'reasonably germane' test [which is used to apply the rule] must contain as its ultimate criterion whether an initiative measure is internally interrelated as a whole and parts. A standard that focuses on whether the measure is capable of bearing some label is simply empty." (Id. at p. 364, 276 Cal.Rptr. 326, 801 P.2d 1077 [conc. & dis. opn. of Mosk, J.].)

Examined under the foregoing principles, Proposition 140 does not satisfy the single-subject rule. The rule requires a coherent enactment. The

test is whether the initiative is internally interrelated. The measure here fails.

By its very terms, Proposition 140 reveals itself to be incoherent: it lacks the requisite internal interrelationship. The initiative embraces three separate and independent subjects--subjects that are unquestionably of major significance. The first concerns term limits for 132 elected state officials, excluding--for no discernible reason--only the Insurance Commissioner. The second deals with restrictions on the retirement benefits of legislators only. The third relates to limits on expenditures by the Legislature and no other branch of government.

The Legislative Analyst so understood Proposition 140. Indeed, in the analysis presented to the voters in the Ballot Pamphlet, he expressly declared that "This initiative makes three major changes to the California Constitution." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with *538 arguments to voters, Gen. Elec. (Nov. 6, 1990), analysis of Prop. 140 by Legis. Analyst, p. 69 (hereafter Ballot Pamphlet).)

Proposition 140 must be read to have, as a broad purpose, the transformation of the California Constitution from an instrument that allows--and in the view of the initiative's proponents, actually invites--the election and reelection to the Legislature of "politicians," to one that prohibits such a result and in fact encourages service by "citizens."

Such a reading is compelled by the clear meaning of Proposition 140's plain words. Its provisions seek to bar any professional cadre from entering into, or arising out of, the Legislature.

This reading is confirmed by all the Ballot Pamphlet arguments relating to the initiative. Of course, proponents and opponents expressed conflicting opinions as to the wisdom of such a transformation. But both recognized its reality.

The majority find no single-subject violation. They reason that the initiative deals with a "unifying theme or common purpose" that they call "incumbency reform." (Maj. opn., ante, at p. 295 of 286 Cal.Rptr., at p. --- of --- P.2d.) Such a theme is not "unifying"; such a purpose is not "common." The term "incumbency reform" **1338 is ***312 nothing more, and nothing less, than a

seductive label of indefinite scope--a label that can be applied to any "grab bag" containing any provisions, no matter how numerous or heterogeneous, that relate to some officeholder in some way. It begs reality to hold that an initiative that "makes three major changes to the California Constitution" (Ballot Pamp., supra, analysis of Prop. 140 by Legis. Analyst, p. 69) embraces only one subject. But the majority cavalierly do so. [FN1]

FN1. I recognize that the majority opinions in *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 245-253, 186 Cal.Rptr. 30, 651 P.2d 274, and *Raven v. Deukmejian*, supra, 52 Cal.3d 336, 346-349, 276 Cal.Rptr. 326, 801 P.2d 1077, furnish some support for the conclusion of the majority here. But the reasoning of Brosnahan in this regard is demonstrably faulty. (*Brosnahan v. Brown*, supra, 32 Cal.3d at p. 299, 186 Cal.Rptr. 30, 651 P.2d 274 (dis. opn. of Mosk, J.); *Raven v. Deukmejian*, supra, 52 Cal.3d at pp. 363-364, 276 Cal.Rptr. 326, 801 P.2d 1077 [conc. & dis. opn. of Mosk, J.] So too is that of Raven. (*Raven v. Deukmejian*, supra, at pp. 364-365, 276 Cal.Rptr. 326, 801 P.2d 1077 [conc. & dis. opn. of Mosk, J.] It is never too late, or too early, to correct error. My colleagues, however, fail to take the opportunity presented by this case to overrule Brosnahan and Raven to the extent that they are implicated here. No justification or excuse appears.

II. Proposition 140 and the Revision Requirements

Proposition 140 amounts to an unconstitutional revision of the state charter on its face and, as a result, is invalid.

Article XVIII of the California Constitution, which is entitled "Amending and Revising the Constitution," provides for (1) amendment by proposal of *539 the Legislature or initiative by the people and (2) revision by proposal of the Legislature or constitutional convention called by the Legislature with the approval of the people. Manifestly, these procedures are exclusive. Thus, an amendment may be effected only by legislative proposal or popular initiative. And a revision may be effected only by legislative proposal or constitutional convention. It follows that a popular initiative may amend but may not revise. (*Brosnahan v. Brown*, supra, 32 Cal.3d at p. 260, 186 Cal.Rptr. 30, 651 P.2d 274; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of*

(Cite as: 54 Cal.3d 492, *539, 816 P.2d 1309, **1338, 286 Cal.Rptr. 283, ***312)

Equalization (1978) 22 Cal.3d 208, 221, 149 Cal.Rptr. 239, 583 P.2d 1281.)

"Amendment" and "revision" are not defined in article XVIII or elsewhere in the California Constitution in express terms. But almost 100 years ago, in *Livermore v. Waite* (1894) 102 Cal. 113, 36 P. 424, the court suggested their meaning.

At that time, article XVIII provided "two methods" for effecting changes in the Constitution: revision by constitutional convention and amendment by legislative proposal. (*Livermore v. Waite*, supra, 102 Cal. at p. 117, 36 P. 424.)

The *Livermore* court declared: "Under the first of these methods the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States.... The constitution itself has been framed by delegates chosen by the people for that express purpose, and has been afterwards ratified by a vote of the people, ... and the provision in article XVIII that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the ... article, to afford the means of effecting the same result which ... has been guarded with so much care and precision. The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was ***313 **1339 framed." (*Livermore v. Waite*, supra, 102 Cal. at pp. 117-119, 36 P. 424.)

More than 50 years later, in *McFadden v. Jordan* (1948) 32 Cal.2d 330, 196 P.2d 787, the court considered whether the so-called "California Bill of Rights," if approved, would effect an amendment or a revision.

*540 At the threshold, the *McFadden* court set out the principles stated in *Livermore*. It then proceeded to determine their applicability to initiatives. "The initiative power reserved by the people by amendment to the Constitution in 1911 [citation] applies only to the proposing and the adopting or rejecting of 'laws and amendments to the Constitution' and does not purport to extend to a constitutional revision." (*McFadden v. Jordan*, supra, 32 Cal.2d at p. 333, 196 P.2d 787.) It went on to explain: "The differentiation" "between amend and revise" "is not merely between two words; more accurately it is between two procedures and between their respective fields of application.... The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision." (Id. at p. 347, 196 P.2d 787.)

Among other things, observed the *McFadden* court, the "California Bill of Rights" would (1) add what were in actuality 12 articles in 208 sections with over 21,000 words to a document containing 25 articles in 347 sections with about 55,000 words; (2) repeal or substantially alter at least 15 of those 25 articles; (3) treat a minimum of 4 new topics; and (4) substantially curtail the functions of both the legislative and executive branches. (*McFadden v. Jordan*, supra, 32 Cal.2d at pp. 334-345, 196 P.2d 787.)

"Applying the long established law to any tenable view of the facts which have been related," the *McFadden* court concluded, "it is overwhelmingly certain that the measure now before us would constitute a revision of the Constitution rather than an amendment or 'such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed.'" (*McFadden v. Jordan*, supra, 32 Cal.2d at pp. 349-350, 196 P.2d 787, quoting *Livermore v. Waite*, supra, 102 Cal. at pp. 118-119, 36 P. 424.)

Next, in *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, supra, 22 Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281, the court addressed the question whether Proposition 13,

(Cite as: 54 Cal.3d 492, *540, 816 P.2d 1309, **1339, 286 Cal.Rptr. 283, ***313)

which added article XIII A to the California Constitution, was amendatory or revisory. It stated: "Taken together our *Livermore* and *McFadden* decisions mandate that our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in *541 the nature of our basic governmental plan as to amount to a revision also." (22 Cal.3d at p. 223, 149 Cal.Rptr. 239, 583 P.2d 1281.) Applying the foregoing standard, the court determined that Proposition 13 had insufficient qualitative or quantitative effect to constitute a revision.

Then, in *People v. Frierson* (1979) 25 Cal.3d 142, 158 Cal.Rptr. 281, 599 P.2d 587, a plurality of the court considered in dictum whether a 1972 initiative measure was amendatory or revisory. The measure added section 27 to article I of the California Constitution, validating the death penalty as a permissible punishment under that instrument. The plurality concluded that the initiative effected an amendment only: "In *Amador Valley*, we observed that 'even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision....' Section 27, ***314 **1340 however, accomplishes no such sweeping result." (25 Cal.3d at pp. 186-187, 158 Cal.Rptr. 281, 599 P.2d 587 (plur. opn.), citation omitted [dictum].)

Next, in *Brosnahan v. Brown*, supra, 32 Cal.3d 236, 186 Cal.Rptr. 30, 651 P.2d 274, the court addressed whether Proposition 8, as a whole, was amendatory or revisory. Applying the "dual analysis" of *Amador Valley*, which "examin[es] both the quantitative and qualitative effects of" an initiative "upon our constitutional scheme," the court concluded that the measure "did not accomplish a 'revision'...." (32 Cal.3d at pp. 260-261, 186 Cal.Rptr. 30, 651 P.2d 274.)

Finally, in *In re Lance W.* (1985) 37 Cal.3d 873, 210 Cal.Rptr. 631, 694 P.2d 744, the court considered whether section 3 of Proposition 8,

which added article I, section 28, subdivision (d), to the California Constitution, was revisory. It had first determined that section 3 of the initiative abrogated the judicially created exclusionary rule as a remedy for the violation of a criminal defendant's state constitutional right against unreasonable searches and seizures. It reasoned that the people's exercise of the legislative power to restrict judicial authority in this area "does not, either qualitatively or quantitatively, 'accomplish such far reaching changes in the nature of [judicial authority] as to amount to a 'revision' of the Constitution" because such power is constitutionally recognized and its use in this matter does not amount to "a sweeping change either in the distribution of powers made in the organic document or in the powers which it vests in the judicial branch...." (37 Cal.3d at pp. 891-892, 210 Cal.Rptr. 631, 694 P.2d 744.)

In light of the case law, the definitional standard applicable for purposes of article XVIII of the California Constitution is as follows. A "revision" denotes a change that is qualitatively or quantitatively extensive, affecting the "underlying principles upon which [the Constitution] rests" or the "substantial entirety of the instrument." (*Livermore v. Waite*, supra, 102 Cal. at *542 p. 118, 36 P. 424.) By contrast, an "amendment" denotes a change that is qualitatively and quantitatively limited, making a modification "within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (Id. at pp. 118-119, 36 P. 424.) [FN2]

FN2. It could perhaps be argued that the definitional standard may require modification. In *Livermore*, the court reasoned in substance that "revision" denoted qualitatively or quantitatively extensive change because the process of revision as then defined, i.e., by constitutional convention, was exceptionally difficult. In *McFadden*, the court adhered to that reasoning because its predicate still obtained. In *Amador Valley*, the court recognized that a change had been wrought: formerly, "a constitutional revision could be accomplished only by the elaborate procedure of the convening of, and action by, a constitutional convention" (22 Cal.3d at p. 222, 149 Cal.Rptr. 239, 583 P.2d 1281, italics in original); now, it can also be effected by the relatively simple procedure of legislative proposal (id. at p. 221, 149 Cal.Rptr. 239, 583 P.2d 1281). The court implied the change was "significant." (Id. at p. 222, 149 Cal.Rptr. 239, 583 P.2d 1281.)

(Cite as: 54 Cal.3d 492, *542, 816 P.2d 1309, **1340, 286 Cal.Rptr. 283, ***314)

But it apparently failed to appreciate precisely what its "significance" was. Because the process of revision as now defined is slightly, if at all, more difficult than the process of amendment, "revision" might perhaps be deemed to denote a change that is slightly, if at all, more extensive than that accomplished by "amendment." In a word, if an "amendment" is a modification "within the lines of the original instrument," a "revision" is any change beyond those lines in any degree.

I now turn to the question whether Proposition 140 amounts to an unconstitutional revision.

As explained above, the initiative has as a broad purpose the transformation of the California Constitution from an instrument that allows, and perhaps actually invites, the election and reelection to the Legislature of "politicians," to one that prohibits such a result and in fact encourages service by "citizens."

I observe at the outset that the wisdom of Proposition 140 is of no consequence to the analysis. To be sure, the initiative may be judged foolish and impractical. But it may also be viewed otherwise. Certainly, the exercise of governmental authority by "citizens" as opposed to "politicians," including the wielding of legislative power, has long been an ideal within the Western ***315 **1341 political tradition, and sometimes even a reality. (See Maio, *Politeia and Adjudication in Fourth-Century B.C. Athens* (1983) 28 *Am.J.Juris.* 16, 17-23.) Again, however, the desirability of the measure is immaterial.

The basic governmental plan of California is established, of course, by the California Constitution. The powers are the legislative, executive, and judicial. (Cal. Const., art. III, § 3.) The branches that are vested with those powers are, respectively, the Legislature (id., art. IV, § 1), the Governor (id., art. V, § 1), and the judiciary (id., art. VI, § 1).

The nature of the three powers and the function of the three branches have been settled since virtually the inception of our polity.

*543 In *Nougues v. Douglass* (1857) 7 Cal. 65, the court stated: "The three great departments are essentially different in their constitution, nature, and powers, and in the means provided for each by the

Constitution, to enable each to perform its appropriate functions. These three departments are all equally necessary to the very existence of the government. [¶] The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the Constitution. It is primarily [sic] and original, antecedent and fundamental, and must be exercised before the other departments can have anything to do. Its exercise is a condition precedent, and the exercise of the executive and judicial functions are conditions subsequent. The legislative power makes the laws, and then, after they are so made, the judiciary expounds and the executive executes them." (Id. at pp. 69-70, italics in original.)

Manifestly, Proposition 140 amounts to an unconstitutional revision because of its significant effect on the Legislature.

As the discussion above reveals, the Legislature is a fundamental component of the state constitutional system. It is one of the "three great departments" and is "necessary to the very existence of the government." (*Nougues v. Douglass*, supra, 7 Cal. at pp. 69-70.) Indeed, its power is the "creative element" in the scheme. (Id. at p. 70.)

Moreover, the Legislature must be deemed fundamentally altered by any substantial change in its nature or character.

Finally, the change that would be effected by Proposition 140 would be substantial. In the state's history, only two such changes have clearly been of this sort: the movement from a full-time Legislature with broad powers to a part-time body subject to narrow limitations, which was effected when the present Constitution superseded the original instrument in 1879; and a movement in the opposite direction, which was accomplished under the successful proposal of the California Constitutional Revision Commission in 1966. The change here would be of similar magnitude: "citizens" would be put in the Legislature in the place of "politicians."

In *Raven v. Deukmejian*, supra, 52 Cal.3d 336, 276 Cal.Rptr. 326, 801 P.2d 1077, we held that section 3 of Proposition 115 amounted to an unconstitutional revision because of its significant effect on the judiciary. The provision in question, designed to amend article I, section 24, of the

California Constitution, would have restricted the power of state courts to interpret certain state constitutional rights of criminal defendants. Like the Legislature, the judiciary is one of the "three great departments" and is "necessary to the very existence of the government." (Nongues v. Douglass, supra, 7 Cal. at pp. 69-70.) Also like *544 the Legislature, it must be deemed fundamentally altered by any substantial change in its nature or character. The change threatened by section 3 of Proposition 115 would have been such.

It follows a fortiori that an initiative that would put laypersons into the judiciary in the place of jurists would amount to an unconstitutional revision because of its significant effect on that branch. Clearly, such a provision would go far beyond section 3 of Proposition 115 in fundamentally altering the courts by effecting a substantial change in their nature and character.

***316 **1342 If an initiative like the foregoing would be an unconstitutional revision, so too Proposition 140. The one would improperly affect the judiciary, the other the Legislature.

In sum, Proposition 140 would fundamentally alter a fundamental component of the state constitutional system by effecting a substantial change in the nature and character of the Legislature. Such an alteration, of course, would be qualitatively extensive, affecting the "underlying principles upon which [the Constitution] rests." (Livermore v. Waite, supra, 102 Cal. at p. 118, 36 P. 424.) Therefore, it would be revisory.

The majority conclude to the contrary. They reason that Proposition 140's possible future consequences for the Legislature are not dispositive. I agree. They also reason that the initiative does not affect the Legislature's constitutional structure or powers. Again, I agree. But as explained above, a judiciary comprising laypersons is fundamentally different from one made up of jurists—even if its structure and powers are the same. Similarly, a Legislature of "citizens" is fundamentally different from one of "politicians." It is a "citizen" Legislature that is the measure's object and also its necessary and inevitable effect.

The majority's claim that "the initiative process may represent the only practical means of achieving the kind of 'reforms' of the Legislature involved here" (maj. opn., ante, at p. 290 of 286 Cal.Rptr., at p. — of — P.2d, italics added) is simply immaterial. The initiative process is not a proper means of achieving "reforms" that are revisory. True, "our Constitution plac[es] '[a]ll political power' in the people" and recognizes their "... right to alter or reform [government] when the public good may require." (Id. at p. 294 of 286 Cal.Rptr., at p. — of — P.2d, italics deleted.) But it also restricts the wielding of that power and the exercise of that right through various provisions—among which, of course, are the requirements governing revision.

*545 III. Conclusion

For all the reasons stated above, I would invalidate Proposition 140 in its entirety as violative of the single-subject rule and as unconstitutionally revisory. [FN3]

FN3. Because of the result I reach, I need not proceed further. I note in passing that Proposition 140 is also arguably invalid as a bill of attainder proscribed by article I, section 10, clause 1, of the United States Constitution. Bills of attainder, within the meaning of the federal charter, are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial...." (United States v. Lovett (1946) 328 U.S. 303, 315, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252.) In substance and effect, the measure here is such: it is a popular initiative that imposes the nonjudicial penalty of disqualification on the "easily ascertainable members" of the Legislature who were its primary targets. With apparent reason, the punishment of disqualification is visited on those who are convicted of certain crimes specified in the Constitution and statutes of California. (See Gov.Code, § 1021.) With no reason whatever, the same penalty now awaits those who were Proposition 140's primary targets. With less reason still, it also awaits all others who hold or will hold the offices specified in the initiative.

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UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

D.C. No. CV-95-02638-CW

v.

and

Intervenors-Appellees.

BILL JONES, Secretary of the
State of California,

Defendant-Appellant,
and

PETER F. SCHABARUM; LEWIS K.
UHLER,

Intervenors-Appellants,

v.

TOM BATES; EDWARD H. LYMAN;
RICHARD D. LEWIS; LAWRENCE
J. BUCHALTER; JONATHAN
BROWNING; RACHEL SHERMAN,

Plaintiffs-Appellees,

and

NATIONAL TAX LIMITATION
COMMITTEE; ALLIANCE OF
CALIFORNIA TAXPAYERS &
INVOLVED VOTERS,

Intervenors,

v.

BILL JONES, Secretary of the
State of California,

Defendant-Appellant.

No. 97-15914

D.C. No. CV-95-02638-CW

OPINION

Appeals from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued En Banc and Submitted November 21, 1997
San Francisco, California

Filed December 19, 1997

Before: HUG, Chief Judge, BROWNING, SCHROEDER, FLETCHER,
PREGERSON, THOMPSON, O'SCANLAIN, TROTT, RYMER,
KLEINFELD and HAWKINS, Circuit Judges.

Opinion by Judge Thompson

THOMPSON, Circuit Judge:

OVERVIEW

A former state legislator and several of his constituents filed this action, contending the lifetime term limits in California's Proposition 140 violate their federal constitutional rights. After a trial, the district court agreed and enjoined the Proposition's enforcement. The district court stayed its injunction pending appeal.

A divided three-judge panel of this court affirmed the district court. A majority of the active judges of the full court then voted to rehear the case en banc and, to accommodate the parties' interests, we agreed to rehear the case on an expedited basis. We have done so and we now reverse the district court.

FACTS

The facts are set forth in detail in the panel's opinion, see Jones v. Bates, 127 F.3d 839 (9th Cir. 1997). We summarize them briefly.

In 1990, California voters approved Proposition 140, an initiative which imposed specific lifetime term limits for state legislators and certain state officers. The Proposition limited state senators to two terms, state assembly members to three terms, and the state governor to two terms. Cal. Const. art. IV, § 2(a); art. V, § 2. The Proposition also limited to two terms the Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, and the members of the Board of Equalization. Id. at art. V, § 11; art.

IX, § 2; art. XII, § 17. The Proposition declared that the lack of term limits created "unfair incumbent advantages" which "discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers." Id. at art. IV, § 1.5. The Proposition stated the term limits were necessary "[t]o restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office" Id.

In 1991, the state legislature and several individual legislators and constituents challenged before the California Supreme Court the constitutionality of Proposition 140's term limits. On a petition for a writ of mandate, the California Supreme Court concluded that Proposition 140's lifetime term limits did not violate the plaintiffs' federal constitutional rights. See Legislature v. Eu, 816 P.2d 1309 (Cal. 1991), cert. denied, 503 U.S. 919 (1992).

Thereafter, in 1995, Tom Bates, a former member of the California Assembly, and a group of his constituents filed the present action, also alleging the lifetime term limits of Proposition 140 are unconstitutional. The district court agreed. See Bates v. Jones, 958 F. Supp. 1446 (N.D. Cal. 1997). The district court determined Proposition 140 imposed a severe burden on the plaintiffs' first and fourteenth amendment rights and was not narrowly tailored to advance a compelling state interest. The district court enjoined the enforcement of Proposition 140 but stayed its injunction pending appeal.

A panel of this court, with Judge Sneed dissenting, affirmed the judgment of the district court on other grounds and did not reach the issue whether the term limits are constitutional. Bates, 127 F.3d at 844. This en banc review followed.

DISCUSSION

A. Res Judicata

The State presents a strong argument that res judicata bars the plaintiffs from bringing the present action because they are bound by the decision of the California Supreme Court in Eu. We conclude, however, that California would apply its public interest exception to the res judicata doctrine and, thus, would reexamine the merits of the constitutional issue.

California recognizes an exception to the doctrine of res judicata when "the public interest requires that relitigation not be foreclosed." Kopp v. Fair Political Practices Comm'n, 905 P.2d 1248, 1256 (Cal. 1995) (quotations and citations omitted). When the issue previously litigated involves an issue of public importance and there are unusual circumstances favoring reexamination of the issue, California does not apply preclusive effect to the prior determination. See id.; City of Sacramento v. State, 785 P.2d 522, 528-29 (Cal. 1990); Arcadia Unified Sch. Dist. v. State Dep't of Educ., 825 P.2d 438, 440-42 (Cal. 1992).

The current case justifies application of the public interest exception. In Eu, the California Supreme Court decided to exercise its original jurisdiction on a petition for a writ of mandate, because of the significance and importance of the legal

issues raised by the challenge to Proposition 140. As a result, the usual avenues of appellate review were not utilized and the California Supreme Court did not have the benefit of a lower court record. Further, when deciding Eu, there was a paucity of case law addressing the validity of term limits. Since Eu, the United States Supreme Court has decided two significant cases, shedding light on that issue, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995), and Burdick v. Takushi, 504 U.S. 428 (1992). We conclude that, in the unique circumstances of this case, the public interest exception applies. We therefore consider the merits of the case.

2. Notice

The three-judge panel did not resolve whether Proposition 140 violates the plaintiffs' first and fourteenth amendment rights. Instead, the panel determined Proposition 140 was invalid because the Proposition and the ballot materials did not provide California voters with sufficient notice that the Proposition imposed lifetime rather than consecutive term limits. Bates, 127 F.3d at 844. We disagree, and, consistent with the California Supreme Court, we hold that the relevant ballot materials and the surrounding context provided sufficient notice making it clear that Proposition 140 required lifetime bans.

The portion of the Proposition affecting legislators states: "No Senator may serve more than 2 terms" and "No member of the Assembly may serve more than 3 terms." Nowhere in the Proposition does it state that these bans are less than absolute. As Judge

Sneed pointed out in his dissent from the three-judge panel decision, the twenty-second amendment to the Constitution uses similar language: "[n]o person shall be elected to the office of the President more than twice" There certainly is no confusion that this language imposes a lifetime ban on the office of the President -- even though the amendment does not specifically use the term "lifetime."

The surrounding circumstances also clearly indicate the voters had sufficient notice that Proposition 140 imposed lifetime bans. The opposition materials to the Proposition, which were circulated to California voters, clearly state that elected state legislators will be "banned for life" and use "lifetime ban" or similar terminology no less than eleven times. Moreover, when Proposition 140 was submitted to the voters in 1990, there were two competing initiatives on the ballot imposing term limits. In contrast to Proposition 140's lifetime ban, Proposition 131 proposed consecutive term limits. The two propositions received extensive media attention, which was heightened after the California Supreme Court issued a decision five days before the election addressing which of two propositions would govern in the event both were approved. See Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm., 799 P.2d 1220 (Cal. 1990) (specifically addressing Propositions 68 and 73).

→ Assuming, without deciding, that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot measure dealing

with term limits on state officeholders, we hold that California's notice with regard to Proposition 140 was sufficient.

C. Constitutionality of Proposition 140's Lifetime Term Limits

In Burdick, the Supreme Court set forth the analysis we must apply to determine the constitutionality of Proposition 140. We

must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). If the measure in question severely burdens the plaintiffs' rights, we apply strict scrutiny review. Burdick, 504 U.S. at 434. If, however, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Id. (quoting Anderson, 460 U.S. at 788).

The rights which the plaintiffs seek to vindicate in this case are the right to vote for the candidate of one's choice and the asserted right of an incumbent to again run for his or her office. Proposition 140's impact on these rights is not severe. As argued by the State, term limits on state officeholders is a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose. See Burdick, 504 U.S. at 433. With regard to incumbents, they may enjoy the incumbency of a single office for a number of years, and, as

pointed out by the California Supreme Court, they are not precluded from running for some other state office.

Most important, the lifetime term limits do not constitute a discriminatory restriction. Proposition 140 makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender. Nor does the Proposition "limit[] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." Anderson, 460 U.S. at 793.

Proposition 140's minimal impact on the plaintiffs' rights is justified by the State's legitimate interests. As the Proposition itself states, a lack of term limits may create "unfair incumbent advantages." Long-term entrenched legislators may obtain excessive power which, in turn, may discourage other qualified candidates from running for office or may provide the incumbent with an unfair advantage in winning reelection. As the Supreme Court stated in Thornton,^{1/}

Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new

^{1/} As pointed out by Judge Sneed in his dissent from the three-judge panel opinion, Thornton does not provide support for the argument that Proposition 140's term limits are unconstitutional. Bates, 127 F.3d at 868 (Sneed, J., dissenting). In Thornton, the Court addressed a state's attempt to impose term limits on members of Congress. See Thornton, 514 U.S. at 783. The case did not involve a state's amendment of its constitution to impose term limits on state officeholders.

perspectives, and may decrease the likelihood that representatives will lose touch with their constituents.

Thornton, 514 U.S. at 837. California voters apparently perceived lifetime term limits for elected state officials as a means to promote democracy by opening up the political process and restoring competitive elections. This was their choice to make. Cf. Clements v. Fashing, 457 U.S. 957, 972 (1982).

We hold that Proposition 140's lifetime term limits do not violate the plaintiffs' first and fourteenth amendment rights. The judgment of the district court invalidating Proposition 140 is reversed and its injunction enjoining enforcement of the Proposition is vacated. The stay pending appeal is vacated as moot.

REVERSED.

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DEC 19 1997

**CATHY A. GATTERSON, CLERK
U.S. COURT OF APPEALS**

I concur in the result reached by Judge Thompson for the court and, except for a threshold concern, I would agree with his sound analysis of the merits. I also join in Judge Rymer's thoughtful discussion of the Rooker-Feldman doctrine and her analysis of res judicata. I write separately for two reasons: first, to suggest the utter absence of a federal question -- irrespective of the Rooker-Feldman doctrine or res judicata -- and hence an additional ground for our lack of jurisdiction to hear the case at all; and second, to respond to Judge Fletcher's dissent in which she urges that Proposition 140 is constitutionally infirm for lack of adequate "notice" to California voters.

I have grave doubt that our court has jurisdiction to review this case, irrespective of Judge Rymer's concurring opinion or Judge Schroeder's dissent. There is compelling authority that a state's adoption of term limits on its own government's elected officials fails to raise a substantial federal question.

In Moore v. McCartney, 425 U.S. 946 (1976), the Supreme Court last had the opportunity to rule on term limits for state officials and it summarily dismissed, for want of a federal question, an appeal from the West Virginia Supreme Court upholding term limits on state executive officials. See State ex rel Maloney v. McCartney, 159 W.Va. 513, 519-20 (1976).

The ruling in Moore has the same effect as a summary affirmance and is fully binding on all lower courts. See Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam); Wright v. Lane County Dist. Ct., 647 F.2d 940, 941 (9th Cir. 1981). "Summary dismissals for want of a substantial federal question are decisions on the merits that bind the lower courts until subsequent decisions of the Supreme Court suggest otherwise." Wright, 647 F.2d at 941; see also Mandel, 432 U.S. at 176 (summary dismissals "prevent lower courts from coming to the opposite conclusions on the precise issues presented and necessarily decided by those actions.") The "precedential value of a dismissal for want of a substantial federal question extends beyond the facts of the particular case to all similar cases." Wright, 647 F.2d at 941.

Moore affirmed the Maloney decision which rejected an incumbent state officeholder's federal constitutional claim that consecutive term limits violated the Fourteenth Amendment to the Constitution. In his dissent in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 799, 925 (1995), Justice Thomas (joined by Chief Justice Rehnquist and Justices O'Connor and Scalia) shed some light on the significance of Moore. Thornton, of course, concerned the issue of whether states could limit the terms of members of the Congress of the United States chosen by the electorate of such states. The Supreme Court held that the Qualifications Clause of the Constitution, Article I, Section 5, prohibited the establishment of term limits by a state for its representatives and senators serving in the Congress of the United States. Id. at 831. Justice Thomas disagreed with the majority

that such laws should be reviewed under the Qualifications Clause, and instead noted that "laws that allegedly have the purpose and effect of handicapping a particular class of candidates traditionally are reviewed under the First and Fourteenth Amendments. . . . Term limit measures have tended to survive such review without difficulty." Id. at 925.

Justice Thomas was referring to laws imposed by a state on its federal representatives, as was at issue in Thornton, not by a state on its own officeholders. However, in support of the proposition that state-imposed term limits on federal representatives have tended to survive review without difficulty, Justice Thomas cited Moore, explaining that the Supreme Court dismissed the appeal from Maloney, "on the ground that limits on the terms of state officeholders do not even raise a substantial federal question under the First and Fourteenth Amendments." Thornton, 514 U.S. at 925 (emphasis added). The Supreme Court's disposition of Maloney on this ground is not surprising in light of the Court's recognition of the fundamental interest of a state in determining the structure of its government. See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). What is noteworthy about this reference, however, is that, as relevant as Moore may have been with regard to federal officials, it is compelling as applied to state term limits. Indeed, we are presented today with the same question the Supreme Court dismissed in Moore for want of a substantial federal question: the constitutionality of limits on the terms of state officeholders.

For us to ignore the precedential value of Moore, we must

necessarily decide that there is a constitutionally significant difference between executive and legislative term limits or between permanent and consecutive term limits. It appears from Thornton that these differences were not particularly persuasive to Justice Thomas and those joining him as he drew no such distinction in his characterization of the disposition of Moore. Further, the fact that the myriad of courts which have considered the various types of term limits have all reached the same result -- that term limits on state officeholders are constitutional¹ -- also leads me to believe that, if there is any difference, it is not of constitutional significance. Moreover, the California Supreme Court, when presented squarely with the argument that Maloney (and, by inference Moore) was of limited significance to Proposition 140's lifetime legislative term limits because it "involved a limitation on consecutive terms of a Governor," responded that "many, if not all of the considerations mentioned

¹ See e.g., League of Women Voters v. Diamond, 923 F.Supp. 266, 272 (D.Me. 1996), aff'd, 82 F.3d 546 (1st Cir. 1996) (upholding consecutive legislative term limits); Dutmer v. City of San Antonio, 937 F.Supp. 587, 595 (W.D. Texas 1996) (upholding lifetime term limits for city officials); Miyazawa v. City of Cincinnati, 825 F.Supp. 816, 822 (S.D. Ohio 1993), aff'd, 45 F.3d 126 (6th Cir. 1995) (upholding consecutive legislative term limits); Nevada Judge Assn. v. Lau, 910 P.2d 898, 902-03 (Nev. 1996) (upholding lifetime judicial term limits); U.S. Term Limits v. Hill, 872 S.W.2d 349, 359-60 (Ark. 1994), aff'd on other grounds, 514 U.S. 779 (1995) (upholding lifetime legislative term limits); Legislature v. Eu, 54 Cal.3d 492, 523-24 (1991) (upholding lifetime legislative term limits); Maddox v. Fortson, 172 S.E.2d 595, 596-97 (Ga. 1970) (upholding consecutive executive term limits); Roth v. Cuevas, 158 Misc.2d 238, 251-53, aff'd, 603 N.Y.S.2d 736, aff'd, 82 N.Y.2d 791 (1993) (upholding consecutive term limits for city officials); Cawdrey v. Redondo Beach, 15 Cal.App.4th 1212, 1231 (1993) (upholding lifetime legislative term limits); see also Gregory, 501 U.S. at 473 (upholding lifetime ban on judges after age seventy).

in Maloney (e.g., eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch."

Legislature of the State of California v. Eu, 54 Cal.3d 492, 523-24 (1991). Although I voice no opinion on the desirability of the policy considerations noted in Eu, I agree with the California Supreme Court that the considerations involved in executive term limits are equally applicable to legislative term limits, and the same holds for consecutive and lifetime term limits. I am not persuaded that there is a constitutionally significant distinction that would compel us to disregard Moore.

Judge Reinhardt, writing for the original panel in Bates v. Jones, 127 F.3d 839, 850 n.13 (9th Cir. 1997), responded to the State's assertion that the constitutionality of Proposition 140 was controlled by Moore by noting that extensive intervening doctrinal developments counseled against continued reliance on that case, citing Hicks v. Miranda, 422 U.S. 332, 344 (1975), overruled by Mandel, 432 U.S. 173, for the proposition that "reliance on the fact that the Supreme Court has branded a particular question unsubstantial ceases to be appropriate 'when doctrinal developments indicate otherwise.'" In support of the contention that doctrinal developments indicate otherwise, Judge Reinhardt cited the Supreme Court's decisions in Burdick v. Takushi, 504 U.S. 428 (1992), Anderson v. Celebrezze, 460 U.S. 780 (1983), and Thornton, 514 U.S. 779. Upon review of these cases, however, along with the other relevant cases decided by the

responded so directly to the issue before us today. While subsequent cases have presented numerous peripheral ballot access issues to the Court, none has presented the question of the constitutionality of state-imposed term limits on state officeholders as squarely as Moore. For this reason alone, I remain skeptical of the failure of our court to take this case into consideration in disposing of the matter before us.

Moreover, Moore is not inconsistent with any of the significant ballot access cases. As noted in Clements v. Fashing, 457 U.S. 957, 964 (1982), the Supreme Court has departed from "traditional equal protection analysis . . . in two essentially separate, although similar, lines of ballot access cases," those which concern restrictions which are based on wealth, see Clements, 457 U.S. at 964 (citing Bullock v. Carter, 405 U.S. 134, 144 (1972); Lubin v. Panish, 415 U.S. 709, 717-18 (1974)), and those which impose burdens on new or small political parties or independent candidates. Id. (citing, inter alia, Illinois State Bd. of Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979); Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974)). Burdick, 504 U.S. at 441-42 (approving Hawaii's ban against write-in candidates), Anderson, 460 U.S. at 806 (striking down state-imposed filing requirements on presidential candidates), and Timmons v. Twin Cities, 117 S. Ct. 1364, 1375 (1997) (upholding state antifusion law prohibiting candidates from appearing on ballot as candidate of more than one political party), all clearly fit into the latter category. See Clements, 457 U.S. at 64. Term limits on state officials,

however, do not fit into either category, and, more importantly for purposes of the Supreme Court's analysis, do not unfairly or unnecessarily burden "the availability of political opportunity." Id. (quoting Lubin, 415 U.S. at 716). While a failure to provide access to the ballot for new or small political parties or independent candidates or on the basis of wealth may effectively result in the exclusion of unique ideas and viewpoints from the political marketplace, the imposition of term limits raises no similar concerns. Term limits apply to politicians of every stripe regardless of party affiliation. It is understandable that the Supreme Court would consider the two lines of cases noted in Clements to raise a substantial federal question as they have a significant potential clearly to infringe upon First and Fourteenth Amendments rights. See e.g., Clements, 457 U.S. at 965 (burdensome requirements on small and independent parties "may burden First Amendment interests in ensuring freedom of association"). Terms limits, which have no disparate impact on any cognizable group, have less of a potential so to offend.

Consequently, I submit that intervening doctrinal developments in the ballot access cases have not weakened Moore's message that term limits on state officeholders do not present a federal question. As Moore is the last word from the Supreme Court on the issue of term limits on state officeholders, we are compelled to give it appropriate weight in disposing of this case.

II

Judge Fletcher argues in her dissent that Proposition 140 is defective because the voters were not provided with "notice that they were voting on a severe limitation to their fundamental right to vote for candidates of their choice." See infra, Judge Fletcher dissenting opinion at 18; see also infra, Judge Fletcher dissenting opinion at 14 (incorporating Bates, 127 F.3d at 856-63). Although the court's opinion avoids this issue by assuming, without deciding, that a federal court may determine whether a state has given adequate "notice" to its voters in connection with a statewide initiative ballot measure, I feel that Judge Fletcher's analysis should not go unchallenged. First, I will examine whether the people have a "fundamental right to vote for candidates of their choice," and then I will consider whether some special "notice" is necessary when the voters of a state enact legislation via the initiative process.

A

The assertion that the people have a "fundamental right to vote for candidates of their choice" implicates at least two distinct, though closely-related, rights: the right to vote and the right to run for elective office. See Lubin, 415 U.S. at 716 ("[V]oters can assert their preferences only through candidates or political parties The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters.") Consequently, in determining whether people have a fundamental right to vote for

candidates of their choice, it is necessary to examine both the established right to vote and the asserted right to be a candidate and how the two interact.

Voting has long been recognized by the Supreme Court as a "fundamental right." See Harper v. Virginia Board of Elections, 383 U.S. 663, 667 (1965); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). It is axiomatic to say that the right to vote lies at the very core of our system of representative democracy. The right to vote in federal elections is conferred explicitly in Article I, Section 2 of the Constitution. See U.S.CONST. art. I, § 2. The Constitution is silent, however, on the right to vote in state elections; not surprisingly, it does not grant such a right, nor does it bestow upon Congress the power to determine the qualifications of state voters. See Harper, 383 U.S. at 667; see also Oregon v. Mitchell, 400 U.S. 112, 130 (1970). It is within the power of the several states to determine voter qualifications for state elections, so long as said qualifications do not violate any constitutional provision or "any restriction that Congress, acting pursuant to its constitutional powers, has imposed." Harper, 383 U.S. at 667 (quoting Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1959)). As noted by Professor Tribe, every state imposes some restrictions on the franchise. See Laurence H. Tribe, American Constitutional Law § 13-10, at 1084 (2d ed. 1988) (hereinafter, "Tribe"). States have imposed restrictions requiring that voters be of a certain reasonable age, that felons be denied the right to vote, see Richardson v. Ramirez, 418 U.S. 24, 56 (1974), and that voters be state citizens

and residents. See, e.g., Marston v. Lewis, 410 U.S. 679, 679-80 (1973) (upholding 50-day voter residency requirement). These restrictions plainly infringe upon the right to vote -- in some instances, completely prohibiting access to the franchise for millions² of people -- yet all have survived judicial scrutiny at the highest level. Consequently, although the right to vote is considered fundamental, fundamental is not commensurate with absolute.

The necessary corollary to the notion that the people have a fundamental right to vote for candidates of their choice is that there exists a constitutional right to vote for a particular candidate. It seems beyond cavil that the former cannot survive without the latter. The right to vote for a particular candidate, in turn, perforce implicates the right to stand for elective office. The district court in Bates v. Jones, 958 F.Supp. 1446, 1460 (N.D.C.A. 1997), in identifying the constitutional rights implicated by Proposition 130's lifetime legislative term limits, gleaned from the Supreme Court's decision in Burdick, 504 U.S. at 441, a "right to vote for [a] particular candidate." The district court proclaimed that voters can be denied the opportunity to vote for a particular candidate only if "constitutionally adequate" means existed for that candidate to appear on the ballot. See Bates, 958 F.Supp. at 1460. I must respectfully disagree. The district court reads far too much into Burdick's discussion of the

² There were approximately 8,867,000 Californians under the age of eighteen in 1996, the age at which the right to vote cannot be denied or abridged under the twenty-sixth amendment to the U.S. Constitution. See U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 33 (1997); U.S. CONST. amend. XXVI.

means of gaining access to the Hawaii ballot. Indeed, it is well-established that "[a]lthough [a voter] is guaranteed an equal voice in the election of those who govern, [he or she] does not have an unlimited right to vote for any particular candidate." Burdick v. Takushi, 937 F.2d 415, 418 (9th Cir. 1991), aff'd, 504 U.S. 428 (1992). As we noted in Burdick, the Supreme Court has upheld numerous restrictions imposed by the states on who may run for certain state offices. Id.; see e.g., Munro v. Socialist Workers Party, 479 U.S. 189, 196-97 (1986) (upholding state requirement that minor-party candidates receive at least 1% of votes in state's multi-party primary election for candidate to appear on ballot); Clements, 457 U.S. at 972 (upholding provisions of state constitution which provided for automatic resignation of certain state and local officeholders who became candidates for any other state office and which prevented most government officials from becoming eligible to serve in state legislature before completing current term of office); Storer, 415 U.S. at 728-29 (upholding state disaffiliation provision which prevented person from running as independent candidate if he registered with political party during year prior to immediately preceding primary); American Party of Texas, 415 U.S. at 782 (state can deny place on ballot to frivolous candidate by requiring all candidates to "demonstrate a significant, measurable quantum of community support.") Consequently, while there is a right to equal participation in voting, a constitutional right to vote for a particular candidate simply does not exist.³

³ See Tribe at 1062 ("Election-related rights display the

Further, if there is a right to vote for a particular candidate, such right necessarily implicates a corresponding constitutional right to be a candidate. Judge Fletcher suggests in her dissent that "every attempt by a state to set restrictive qualifications concerning who can and who cannot serve as a candidate for elective office implicates rights that are 'fundamental' and requires careful scrutiny." See infra, Judge Fletcher dissenting opinion at 21. The district court also suggested that there is a "right to run for a particular office" that requires protection akin to that afforded the right to vote. See Bates, 958 F.Supp. at 1461 (citing Lubin, 425 U.S. at 716). Once again, I respectfully disagree both with Judge Fletcher and the district court. The interest of an individual in being a candidate is of no exceptional constitutional significance; it does not merit a departure from traditional equal protection principles. "Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access 'does not of itself compel close scrutiny.'" Clements, 457 U.S. at 962 (quoting Bullock, 405 U.S. at 143).

For the foregoing reasons, the asserted constitutional right of the people "to vote for the candidates of their choice" simply does not exist. Consequently, it is evident that no "fundamental right" was "severely limited" by Proposition 140 and thus, the dissent's analysis is fatally flawed.

special feature that the equality with which they are available, rather than the fact of their availability or absence, ordinarily proves decisive.")

As to the contention that Proposition 140's lifetime legislative term limits must fail because the voters of California were not provided with adequate "notice" of the "severe limitation" the provision would impose on their fundamental rights, there is even less foundation in law or tradition. While I agree with the court's opinion that sufficient "notice" of the extent of the term limits provision was provided to the voters of the State of California, I hesitate to assume for even a moment that such "notice" was required or even within the province of a federal court to determine.⁴ See, supra majority opinion at 5-6.

⁴ Along these lines, I find no comfort in the two purported "limitations" on the so-called "notice" doctrine: that it will be applied only in cases where an initiative affects a "fundamental right" and only when said initiative imposes a "severe" limitation on that right. See infra, Judge Fletcher dissenting opinion at 18. First, as evidenced by the assertion of a fundamental right of the people to vote for the candidates of their choice, limiting the "notice" doctrine merely to fundamental rights will in actuality be no limitation at all. Indeed, given that the case law is replete with references to rights which are considered "fundamental," see e.g., California Dept. of Corrections v. Morales, 514 U.S. 499, 515 (1995) (ex post facto clause) (Stevens, J., dissenting); Benton v. Maryland, 395 U.S. 784, 794 (1969) (double jeopardy); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (jury trial), it seems apparent that "notice" would be required in any initiative that tangentially touches upon some cognizable constitutional right. Second, whether a burden is "severe" inevitably becomes a matter of perspective. The original panel determined, in part, that the burden imposed by Proposition 140 was severe by analogizing it to a death penalty case. See Bates, 127 F.3d at 859 (citing Thompson v. Oklahoma, 108 S. Ct. 2687, 2711 (1988), and noting that, while Justice O'Connor stressed that Thompson was an "unusual" and "unique" case, Bates was equally "unusual" and "in many ways, as compelling.") To call the limitation imposed by Proposition 140's term limits "severe" by analogizing it in some respects to a death penalty case is misguided, to say the least, and demonstrates how devoid of content the terms "fundamental" and "severe" really are.

one day have the dubious distinction of being called upon for this purpose.

Such "notice" requirement is most likely grounded in an antipathy for and distrust of the initiative process which finds support in neither the Constitution nor Supreme Court precedent. Although it has been argued that the Supreme Court reviews popular legislation more closely than legislation enacted by representatives, see Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1562-65 (1990); Mark Slonim & James H. Lowe, Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash. L. Rev. 175, 194-96 (1979), an examination of the case law does not bear out such assertion. As noted in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 672-73 (1976), "[i]n establishing legislative bodies, the people can

be treated as adults in the criminal justice system for some purposes and another which authorized capital punishment for murder. Due to the interaction of these two statutes, Thompson, a 15-year-old minor, was convicted of first degree murder and sentenced to death. Justice O'Connor, concurring in the judgement, voted to vacate the death sentence on the ground that "there [was] a considerable risk that the Oklahoma Legislature either did not realize that its action would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility." Id. at 857 (O'Connor, J., concurring). Citing Justice O'Connor's concurrence in support of a general "notice" requirement is somewhat disingenuous, however, because it ignores Justice O'Connor's limitation of her concurrence to death penalty cases and, specifically, "the peculiar circumstances" presented before the Supreme Court in Thompson. Id. The panel's attempt to diminish this distinction by claiming that the rights involved in Bates' action were "equally unusual and, in many ways, as compelling," Bates, 127 F.3d at 859, is unavailing. As Judge Fletcher herself has recently noted, death is "unique." See Thompson v. Calderon, 120 F.3d 1045, 1049 (9th Cir. 1997) (quoting Justice O'Connor's concurrence in Thompson v. Oklahoma, 487 U.S. at 856). With all due respect to the Bates plaintiffs, there is life after the California Assembly.

reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." The Supreme Court applies the very same standard of review both to popular and to representative legislation and has held that the fact that legislation was enacted by initiative "is without constitutional significance."⁶ Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 737 (1964) (striking down, on equal protection grounds, apportionment scheme that violated "one person-one vote" principle notwithstanding approval by voters of state).

To engraft a due process "notice" requirement on popular legislation is to invite the federal courts to look behind initiatives to ensure that voters were capable of understanding

⁶ Skeptics, of course, will point to the decisions in Romer v. Evans, 116 S. Ct. 1620, 1627 (1996), Washington v. Seattle School District No. 1, 548 U.S. 457, 471 (1982), and Reitman v. Mulkey, 387 U.S. 369, 381 (1967), in which the Supreme Court invalidated voter initiatives, in support of the notion that popular legislation is subject to a higher standard of review than traditional legislation. One should not conclude from these cases, however, that the Supreme Court will scrutinize initiatives more closely than representative legislation, only that the Supreme Court will carefully review any legislation -- however enacted -- that impacts important constitutional rights. The laws at issue in Romer, Seattle School District, and Reitman were struck down on the ground that, while facially neutral, they were enacted for discriminatory purposes. See Romer, 116 S. Ct. at 1627 (striking down amendment to state constitution which prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination, noting that "amendment seems inexplicable by anything but animus toward the class that it affects"); Seattle School District, 458 U.S. at 471 ("despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes"); Reitman, 387 U.S. at 381 (invalidating provision of state constitution that "was intended to authorize, and does authorize, racial discrimination in the housing market"). Such scrutiny is obviously not unique to popular legislation, but extends equally to all forms of legislation. See United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1973) (striking down on rational basis review Congressional legislation neutral on its face that had purpose of discriminating against "hippies").

the potential consequences of their actions and acted accordingly. This is simply beyond our province. The Supreme Court has historically presumed that legislators are aware of the consequences of the laws which they enact and has declined to invalidate legislation on the ground that "Congress was unaware of what it accomplished or . . . was misled by the groups that appeared before it." See United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("The language of the statute was clear and we have historically assumed that Congress intended what it enacted."); see also Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 799 P.2d 1220, 1235 (Cal. 1990) ("In order to further the fundamental right of the electorate to enact legislation through the initiative process, this court must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures.") Further, it has long been established that there is no due process right to "notice" in the enactment of legislation. See Bi-Metallic Investment Co. v. State Board of Education, 239 U.S. 441, 445 (1915) (no due process right to notice before government acts in legislative capacity). In light of the fact that there is no constitutionally significant difference between popular legislation and representative legislation, see Lucas, 377 U.S. at 737, we must reject the temptation to create a due process right to "notice" in the initiative process. We simply have no franchise to presume that the citizens of California could not understand what they were doing at the ballot box on November 6, 1990.

III

Like Judge Thompson, I would not interfere with the will of the people of California in adopting Proposition 140; I would reach such result, however, by the route charted by Judge Rymer or Part I of the foregoing analysis. With respect, for the reasons expressed in Part II, I must fundamentally reject the view expressed by Judge Fletcher that federal courts have a writ to impose a newly-minted "notice" requirement on the voters of California.

FILED

DEC 19 1997

Bates v. Jones
Nos. 97-15864/97-15914

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RYMER, Circuit Judge, with whom O'SCANNLAIN, Circuit Judge, joins, concurring in the result:

I agree with Judge Thompson's disposition of Bates's appeal, assuming the merits are reached and that an Anderson/Burdick balancing test is required. However, I write separately for two reasons: First, to explain why I believe that the district court should not have entertained this action because it involves the same claim by related parties already considered and decided by the California Supreme Court. In effect, we are asked to review the state supreme court's opinion that Proposition 140 is constitutional -- but that's not our right to do. Only the United States Supreme Court can overturn a decision by the highest court of a state. For a federal district court to make an independent determination of constitutionality in the face of a final state court adjudication on the same point implicates well-settled doctrines of finality, federalism, and the limits of appellate jurisdiction. Therefore, in my view, the district court lacked the authority to proceed; and in any event, should have declined to do so on grounds of res judicata.

Second, assuming that we have jurisdiction, I write separately to suggest that the state's interest in Proposition 140 is somewhat different, and even stronger than Judge Thompson acknowledges, because the people of the State of California exercised their own constitutional right to choose the form of their representation in the legislative branch of state government. In this they acted in accordance with the

Constitution's guarantee that citizens of each state shall have the right to determine the structure of their own government so long as it is republican in form. Since the state's interest in structuring the state legislature is firmly rooted in the Constitution, a decision to adopt term limits for state officers is presumptively constitutional. In that Proposition 140 is content neutral and no one suggests it discriminates on any basis plainly precluded by other provisions of the Constitution, the presumption is not overcome. For the same reasons, the state's interest in prescribing the qualifications of state officeholders is so powerful, given its constitutional dimension, that the decision to set the number of terms in office as a qualification easily survives whatever scrutiny is required.

I

In Legislature v. Eu, 54 Cal.3d 492 (1991), the Legislature, several individual legislators, and various citizens, voters and taxpayers brought the same constitutional challenges to Proposition 140 that Bates (then, as now, a member of the Legislature), other legislators, and other voters bring in this action. The Bates plaintiffs are represented by the same law firm that represented the plaintiffs in Eu. Apart from budgetary limitations in Proposition 140 that were at issue there but not here, the exact challenges to the constitutional validity of Proposition 140 were raised, considered, and decided by the California Supreme Court in Eu. The plaintiffs in both cases claim that the lifetime ban substantially burdens their

fundamental First and Fourteenth Amendment rights. The court considered and balanced, under Anderson, the character and extent of injury to the incumbent's right to run for public office and the voters' right to reelect the incumbent; the legitimacy of the state's asserted interests (restoring competitive elections, encouraging qualified candidates to seek public office, and eliminating unfair incumbent advantages); and the necessity of imposing the lifetime restriction. Having done so, the California Supreme Court concluded that the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them, and therefore held that Proposition 140 passes constitutional muster.

How can this ruling possibly be revisited?

A

No federal court except for the United States Supreme Court has appellate jurisdiction over final decisions of the California Supreme Court. As the United States Supreme Court made clear in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), when a state court decides a federal constitutional question that actually arose in the cause before it, its decision is open to reversal or modification by the United States Supreme Court. Unless and until that happens, however, it is an effective and conclusive adjudication. See also District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). In Eu, the California Supreme Court had to decide whether term limits imposed by Proposition 140 violated the United States Constitution, and its decision, whether

right or wrong, was a proper exercise of that court's jurisdiction. Accordingly, no court of the United States other than the Supreme Court can entertain a proceeding to reverse or modify it because to do so would be to exercise appellate jurisdiction which federal district courts (and we) do not have over state court judgments.

As we explained in Dubinka v. Judges of the Superior Court, 23 F.3d 218 (9th Cir. 1994):

Federal district courts may exercise only original jurisdiction; they may not exercise appellate jurisdiction over state court decisions. This rule arises from the interplay of two jurisdictional statutes: 28 U.S.C. § 1331, which grants district courts original jurisdiction over "civil actions arising under" federal law, and 28 U.S.C. § 1257, which grants the Supreme Court the right to review "final judgments . . . rendered by the highest court of a State."

Id. at 221 (citations omitted); see also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970).

The "Rooker-Feldman" doctrine applies even when the challenge to a state court decision involves federal constitutional issues, because state courts are as competent as federal courts to decide federal constitutional issues. Dubinka, 23 F.3d at 221; Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986). Any other rule would result in a waste of judicial resources, and cause needless friction between state and federal courts -- as this case amply illustrates. See McNair, 805 F.2d at 891. Indeed, to re-review the constitutionality of Proposition 140 put the district court on a collision course with the California Supreme Court. At the very least this is unseemly, because the California Supreme Court had the right to decide Proposition 140's

constitutionality. The United States Supreme Court saw fit to let that court's ruling stand. Appellate authority would be turned upside down if the federal district court were able effectively to "overrule" the California Supreme Court. Moreover, as a practical matter, disagreement between a federal district court (or this court) and the California Supreme Court would make a mess of California elections. This is why Rooker-Feldman instructs that a federal district court lacks jurisdiction to start down this path.

Of course, federal district courts do have jurisdiction over a general constitutional challenge to a state enactment that does not require review of a final state court decision in a particular case.¹ See, e.g., Feldman, 460 U.S. at 482-86 (challenge to application of bar admission rule differed from challenge to its constitutionality). In a close case, we decide whether a case falls on the side of permissible general challenge, or the side of an impermissible appeal, by asking whether the constitutional challenge raised in the federal court was "inextricably intertwined" with the state court's decision. See, e.g., McNair, 805 F.2d at 890-93 (holding that we lacked jurisdiction); Dubinka, 23 F.3d at 221-22 (applying test but holding that we had jurisdiction). However, here, there can be no serious question that the constitutional challenge was "inextricably intertwined"; it is, in fact, the only thing decided by the California Supreme Court in Eu and it is the only thing the federal district court was asked to decide in Bates.

¹ Even so, federal courts often abstain to allow the state courts to interpret state statutes first. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

It seems clear to me, therefore, that the district court lacked jurisdiction and (apart from saying that), so do we.

B

But even if we have jurisdiction, related principles of finality embedded in res judicata also counsel against our revisiting what the California Supreme Court decided. Unsurprisingly, under California law, which we apply to this question,² the doctrine of res judicata precludes parties or their privies from relitigating a cause of action or issue that has been finally determined by a court of competent jurisdiction. Bernhard v. Bank of America, 19 Cal. 2d 807, 810 (1942); Lucido v. Superior Ct., 51 Cal. 3d 335, 341 (1990) (party asserting bar must show the factual or legal issues are identical; the issue was actually litigated and there was a final judgment on the merits; and the party to be estopped was in privity). California recognizes, as we do, that claim and issue preclusion curtail vexatious litigation, promote judicial economy, and avoid the issuance of inconsistent judgments that undermine the integrity of the judicial system. See Lynch v. Glass, 44 Cal. App. 3d 943, 948 (1975). Each supports the state's position in this case.

The legal issue in Eu and Bates is identical. The issue was actually, and actively, litigated in the California Supreme Court, which rendered a final judgment on the merits. And legislators as well as voters were parties to Eu, as they are in Bates. To be

² Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379-82 (1985); In re Russell, 76 F.3d 242, 244 (9th Cir. 1996).

sure, they are different legislators, and different constituents, but I fail to see what difference that makes because their respective interests (in succeeding themselves or voting for incumbents) are precisely the same. So is their lawyer. Thus, the Bates plaintiffs share an identity of interest with, and adequate representation by, the losing parties in Eu. Under these circumstances, I cannot believe that any court in California would not feel itself, and a new set of voters or legislators, bound by the California Supreme Court's decision in Eu. See Dyson v. California State Personnel Bd., 213 Cal. App. 3d 711, 723-24 (1989) (recognizing that the question is essentially one of policy, focusing on whether the relationship between the party bringing the earlier suit and the nonparty bringing the current suit is "sufficiently close" to warrant preclusion).³

While courts in California may decline to apply the doctrine of collateral estoppel when preclusion would not serve the public interest and might work an injustice, see e.g., Kopp v. Fair Political Practices Comm'n, 11 Cal. 4th 607 (1995), City of Sacramento v. State, 50 Cal.3d 51 (1990); Louis Stores, Inc. v. Dep't of Alcoholic Beverage Control, 57 Cal. 2d 749 (1962), neither reason would require a California court (or us) to revisit the constitutionality of Proposition 140. Nothing substantive changed about the application of Proposition 140 from October 10,

³ See also Ferris v. Cuevas, 118 F.3d 122 (2nd Cir. 1997) (recognizing the significance of representation by same attorney to application of res judicata principles in cases arising out of the City's refusal to certify initiative petitions where parties were similar but not identical and constitutional issues that could have been raised, but weren't, in state court were asserted in federal court action).

1991 (when Eu was decided), or from March 9, 1992 (when certiorari was denied), until 1995, when Bates filed this action -- except that Bates himself came up against the term limits ban.⁴ That, however, cannot suffice, for the issue of constitutionality which Bates now raises was raised by his colleagues, and was fully litigated, in Eu by the state's highest tribunal. Likewise, the same constitutional issues that Bates's constituents raise were raised by his colleagues' constituents in Eu. Therefore, no injustice inheres for new or different voters, or for new or different legislators; they are equally stuck with the ban on term limits. Nor do the intervening decisions in Burdick and Thornton suggest otherwise: assuming the Anderson test applies, Burdick supports the decision reached by the California Supreme Court (which applied the Anderson standard) because Burdick simply affirmed that the Anderson analysis also governs inquiries into the propriety of state election laws; and Thornton involved the attempt by a state to impose term limits on a federal office, which raises different constitutional questions from the state's adopting term limits on state offices.

Indeed, to revisit the constitutionality of Proposition 140 subverts, rather than serves, the public interest. The California Supreme Court (the final arbiter of state law, and a court quite competent to decide federal constitutional law), made its decision and that decision was left in place when the United States Supreme Court refused to grant a writ of certiorari. It is obviously

⁴ Other legislators who are parties to this action became so at the invitation of the panel.

important for California elections to be held without continual confusion over the governing law. That is a powerful reason the validity of Proposition 140 should be settled by Eu.

I realize that, at the end of the day, whether preclusion principles apply is a matter of policy. But I believe that California courts would conclude that there are no "exceptional circumstances" which justify applying the "extremely narrow" public interest exception in this case. Arcadia Unified Sch. Dist. v. State Dep't of Educ., 2 Cal. 4th 251, 259 (1992).

II

As Professor Tribe has pointed out, decisions about how people are to participate in their own representative government and how they choose to represent themselves is "the very essence of all self-government." Laurence H. Tribe, American Constitutional Law 398 (2d ed. 1988). So, even assuming that the district court had jurisdiction and properly refused to preclude repetitive litigation on the constitutionality of Proposition 140, I start (and mostly stop) with the constitutional right exercised by the people of the State of California to have themselves represented in the legislative branch of their state government by citizen-legislators. That right resides in Article IV, § 4 of the United States Constitution, which declares that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."

As Professor Merritt has explained, the Guarantee Clause restricts the federal government's power to interfere with the organizational structure and governmental processes

chosen by a state's residents. . . . In order to ensure that state and local government remain responsive to their constituents, . . . citizens must have the power to choose the governmental forms that work best for them. The guarantee clause, therefore, grants states control over their internal governmental machinery.

Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 41 (1988). Although there is much debate about the full meaning of Article IV, § 4,⁵ at a minimum it promises the states authority to set qualifications for state and local offices (so long, at least, as they do not otherwise discriminate on an invidious basis plainly prohibited by the Constitution). See Deborah Jones Merritt, Republican Governments and Autonomous States: A New Role for the Guarantee Clause, 65 U. Colo. L. Rev. 815, 828-829 (1994).

This principle has long been recognized by the Supreme Court. As the Court wrote in In re Duncan, 139 U.S. 449, 461 (1891), "the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws." Most recently, Justice O'Connor reiterated the point writing for the plurality in Gregory v. Ashcroft, 501 U.S. 452 (1991):

The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the

⁵ See, e.g., Symposium, Ira C. Rothgerber, Jr. Conference on Constitutional Law: Guaranteeing a Republican Form of Government, 65 U. Colo. L. Rev. 709 (1994).

qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." Taylor v. Beckham, 178 U.S. 548, 570-571, 44 L.Ed. 1187, 20 S.Ct. 890 (1900). See also Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 161, 36 L.Ed. 103, 12 S.Ct. 375 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.").

Gregory, 501 U.S. at 460. The authority of the people of the states to determine the qualifications of their officials

is an authority that lies at "the heart of representative government." It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."

Id. at 463 (citations omitted).

Accordingly, when the people of California enacted Proposition 140 to set the number of terms in office as a qualification for members of their legislature, they were exercising an authority "that lies at the heart of representative government." As the authority to determine the terms upon which state offices shall be held is grounded in Article IV, § 4, and to define how they want to be represented is a right secured to the citizens of each state, a term limits qualification must be presumptively constitutional. Therefore, unless the qualification is plainly prohibited by some other provision in the Constitution, it is constitutional.

Proposition 140 discriminates against no one, applies equally to all citizens, and does nothing to restrict the franchise or freedom of association among like-minded voters and public officeholders (past, present or future). Thus, it is constitutional, for it is well within the range of decisions

guaranteed to the citizens of California without federal interference.

For these reasons I would not start by analyzing Proposition 140 under the Anderson/Burdick test, because terms limits are a qualification for office -- not for access to the ballot. Yet I agree that if that test applies, California's lifetime term limits pass muster for the reasons explained by Judge Thompson and one more: the state's interest in the structure of its legislature is among the strongest possible interests that the citizens of California could have, because it lies at the core of the state's constitutional authority.

FIL

DEC 11

Bates v. Jones
Nos. 97-15864/97-15914

HAWKINS, Circuit Judge, concurring:

CATHY A. CATTE
U.S. COURT OF

I join the majority opinion because, although I believe responsible arguments to be made on both sides, believe the Constitution of the United States restrains of a state from imposing term limits, even a lifetime future service, on their elected state representatives. O here, of course, is to judge not the wisdom of such a measure its constitutionality.

I also write separately to express briefly two other that deserve mention.

First, while I agree with the majority in its res judicata analysis, I would go further than the majority. Not only does a public interest exception enable us to review this matter even if the exception did not apply, this case would not be by res judicata because the parties in this case are complete privity with those in Legislature v. Eu, 816 P.2d (Cal. 1991), cert. denied, 503 U.S. 919 (1992).

The interests of Bates (and the other named plaintiffs) not have been adequately represented by the Legislature or particular legislators in Eu. Bates et al. assert the individual right to run for an additional term or, in the case of their supporters, to vote for the particular candidate of choice. This right is not subsidiary to any interest of the Legislature as an institution might have had in Eu. This creates real doubts about whether the Legislature or the particular legislators in Eu "might" fairly be treated as acting

representative capacity," Lynch v. Glass, 119 Cal. Rptr. 139 (1975), and whether privity exists between the parties in the two actions.

Second, although I agree with the majority that "the relevant ballot materials and the surrounding context provided sufficient notice making it clear that Proposition 140 required lifetime bans," in the interest of balance, the record should be clear that the proponents of Proposition 140 have not exhibited complete consistency on this point. In fact, they argued for the opposite conclusion before the California Supreme Court.

FILED

Bates v. Jones, No. 97-15864

DEC 19 1997

Schroeder, Circuit Judge, dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I agree that the district court must be reversed and injunction vacated. I respectfully disagree with the majority holding that we should reach the merits of the constitutional controversy. The California Supreme Court has already decided Legislature v. Eu, 816 P.2d 1309 (Cal. 1991). The majority correctly recognizes that res judicata would ordinarily bar relitigation of such issues, but incorrectly concludes that the California Supreme Court would apply a "public interest" exception to permit relitigation.

Under the Full Faith and Credit Act, we must give the state court judgment the same preclusive effect that the California Supreme Court would afford it. U.S. Const. art. IV, § 1; 28 U.S.C. § 1738; Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984). There is nothing in California law to suggest the California Supreme Court would decide to revisit the same case it decided a few years ago, particularly when no intervening federal cases would compel it to change its analysis.

The majority cites Kopp v. Fair Political Practices Comm'n, 905 P.2d 1248, 1256 (Cal. 1995). There, the California court applied its public interest exception to consider in the first instance whether to reform a state statute that a federal court had held unconstitutional. There had been no prior state litigation. Thus, California had a considerable public interest. There is no similar public interest to be served in this case by

relitigating the identical claims that the same state court earlier decided.

The panel majority circumvented res judicata by a different route. It held that the particular legislators and voters who are plaintiffs in this case were neither parties to the state court litigation, nor in privity with those parties. The majority in my view correctly, albeit implicitly, recognizes that the panel's position is not sound. Identical voter and legislator interests were asserted by the parties in the earlier litigation, and the plaintiffs in both actions were represented by the same counsel. I believe the California courts would hold that the Legislature and voters in Eu acted in a representative capacity for the plaintiffs in this case, and that they are therefore privies barred by the doctrine of res judicata. See Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 122 P.2d 892 (Cal. 1942).

I would reverse and remand for dismissal of the federal action. I would not decide the merits.

DEC 19 1997

BATES v. JONES, Nos. 97-15864, 97-15914CATRY A. CATTERSON, CLERK
U.S. COURT OF APPEALSFLETCHER, Circuit Judge, with whom Circuit Judge Pregerson joins,
Concurring in Part and Dissenting in Part:

The majority today decides questions of great importance: May a State, consistent with the Constitution, impose a lifetime term limitation upon elected officials for state office, and, if so, how may the State go about enacting such a restriction? These are questions of first impression among the federal courts of appeal. With regret, I must conclude that the majority has not given them the careful consideration that they deserve.

I.

The State of California argues, as do Judge Rymer and Judge Schroeder, that the question of the constitutionality of Proposition 140 is res judicata as between the parties to this action, and that we should not reach the merits of the plaintiffs' claims. It is, of course, well established that federal courts must give full faith and credit to a valid judgment rendered by a state court of competent jurisdiction. See 28 U.S.C. § 1738. More precisely, a federal court must accord such a judgment the same preclusive effect that it would receive in the rendering state. See Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873, 877 (1996). California and Judges Rymer and Schroeder argue that the parties to the present action are the same parties that challenged the constitutionality of Proposition 140 in Legislature v. Eu, 816 P.2d 1309 (Cal. 1991), or at least that they were in

privity with the plaintiffs in that case, and hence that they should be bound by the judgment of the California Supreme Court, and their present claims should be barred. Without deciding whether Bates and the other plaintiffs are actually bound by the Eu decision, the majority concludes (as did the three-judge panel, in an alternative holding on the question) that California would apply its "public interest" exception to res judicata if this case were brought in state court, and so res judicata is no bar to the present action. See supra, majority opinion at 5-6; Bates v. Jones, 127 F.3d 839, 850-51 (9th Cir. 1997). I continue also to subscribe to the panel majority's opinion that these plaintiffs are not barred by res judicata because they were not parties to the prior state court proceeding. See id. at 848-49.

This leads me to respond to Judge Rymer's disagreement on this point contained in her separate concurrence on this issue. Judge Rymer invokes the Rooker-Feldman doctrine, see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), in order to argue that the district court had no jurisdiction even to hear Bates' challenge to Proposition 140. In doing so, she apparently argues that, when the highest court of a state issues a ruling on the constitutionality of a state statute, the Rooker-Feldman doctrine prevents lower federal courts from ever conducting an independent review of the statute's constitutionality, regardless of whether the parties before the federal court are different from the parties in the prior state court proceeding. The majority

properly declines to embrace this extraordinary proposition, which constitutes a serious misreading of the Rooker-Feldman doctrine.¹

A.

As Judge Rymer correctly explains, the Rooker-Feldman doctrine holds that federal courts have no jurisdiction to engage in appellate review of the merits of state court judgments. With some exceptions that are not relevant here, the jurisdiction of federal district courts is original, not appellate. See 28 U.S.C. § 1331. Congress has reserved the duty to hear appeals from individual state court judgments, even on issues of federal constitutional law, exclusively to the U.S. Supreme Court in our judicial system. See 28 U.S.C. § 1257; Dubinka v. Judges of the Superior Court, 23 F.3d 218, 221 (9th Cir. 1994).

¹ Throughout the course of this litigation, California has vigorously advanced the position that "state courts are not bound by lower federal appellate court decisions on federal questions." Petition of the State of California for a Writ of Certiorari, filed Sept. 11, 1997, at 17. Among many other cases, the State has cited Rooker in support of this position. See id. at 24. It is not clear to me whether Judge Rymer, in arguing that states can foreclose review of federal questions by federal courts, means to incorporate this position into her argument. Since she does not do so explicitly, I will not respond to that position at length. I do note, however, that the practical effect of the argument that Judge Rymer advances in her concurrence is that lower federal courts would be bound by state court decisions on federal questions. If we assume, for the sake of argument, that California is correct in its assertion that "state courts are not bound by lower federal appellate court decisions on federal questions," id. at 17, then surely the State could not be heard to argue that the converse would not also be true. What is good for the goose is good for the gander.

judgment that is not entitled to full faith and credit does not acquire extra force via the Rooker-Feldman doctrine." Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1350 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc). This observation holds true both in cases where a party claims that the state proceeding that produced a challenged judgment suffered from a constitutional infirmity (the type of claim that Judge Easterbrook was analyzing in Kamilewicz) and in cases where a party claims that the state court judgment should not bar her action in federal court because it would not bar the same action in a court of the rendering state. Thus, in most cases, the difference between the Rooker-Feldman doctrine and the principle of res judicata amounts to the difference between asking a federal court to review the merits of a binding state court judgment and asking a federal court to address the same issues de novo without reference to the prior judgment. If a party comes to federal court and asks to be relieved of a state court judgment because it was wrongly decided, Rooker-Feldman directs the district court to respond that it has no jurisdiction to engage in such review. If the same party comes into federal court and simply pleads the same claims that were decided in the state court judgment, without making reference to that judgment or asking the district court to review its merits, the Full Faith and Credit Act would require the federal courts to recognize the affirmative defense of res judicata when a defendant interposes the state court judgment as a bar to the plaintiff's claims.²

² The difference between these two situations, while largely

It is difficult to articulate a general rule for identifying the circumstances under which the applicability of Rooker-Feldman and of res judicata are not essentially coextensive. This may be what inspired a leading commentator in the field of Civil Procedure to describe the Rooker-Feldman doctrine as "somewhat peculiar." Marcel Kahan & Linda Silberman, Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims, 1996 Sup. Ct. Rev. 219, 283 n.122. Perhaps the best explanation of the Rooker-Feldman doctrine is to be found by examining the highly unusual interplay between state and federal courts that obtained in the Feldman case itself.

Feldman arose out of the refusal by the District of Columbia Court of Appeals to admit Feldman to the practice of law in that jurisdiction. The Court of Appeals in the District had a blanket rule against admitting individuals, like Feldman, who had not attended an accredited law school, and it refused to make an exception in Feldman's case. See Feldman, 460 U.S. at 465-70. The "judgment" that Feldman challenged in federal district court

formal, is significant. If a district court were to engage in "appellate review" of a state court judgment, the result would be that the state court judgment would be vacated. If a district court were to disregard a state court judgment for res judicata purposes, however, the judgment would remain in existence at the close of the federal proceedings. This distinction maps onto the difference in the control that parties exercise over each doctrine: res judicata is a waivable defense, while infirmities to a court's subject-matter jurisdiction (including Rooker-Feldman review) are not. Compare Clements v. Airport Auth. of Washoe Cty., 69 F.3d 321, 328 (9th Cir. 1995) (res judicata), with Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 n.21 (1978) (subject-matter jurisdiction).

was the refusal by the state court³ to grant him an exception and admit him to the D.C. bar. On review, the Supreme Court held that the denial of Feldman's petition did in fact constitute a "judgment" within the meaning of 28 U.S.C. § 1257, and hence that review of that denial could be had, if at all, only in the U.S. Supreme Court. See id. at 479-82, 486-88.

What is unusual about Feldman is that the claim of right in that case -- the denial to a particular applicant of admission to a state bar -- involved a matter of policy that was under the exclusive control of the court. A claimant has occasion to challenge his denial to the bar of a state only after denial of admission by the state court itself. Since the Court found in Feldman that a denial of admission to the bar constitutes a "judicial proceeding," id. at 479-82, such denials form a unique class of cases in which every claimant will always already be saddled with an unfavorable state court "judgment" before ever being able to claim that he has been improperly denied admission.

In explaining that federal district courts have no jurisdiction to review decisions in this class of cases, the Court carefully distinguished between "general challenges to state bar admission rules and claims that a state court has unlawfully

³ For purposes of appellate review under 28 U.S.C. § 1257, the local courts of the District of Columbia are treated as state courts. See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 172(a)(1), 84 Stat. 590; see also Feldman, 460 U.S. at 403-04.

denied a particular applicant admission." Id. at 485. It is only in the latter class of cases, the Court explained, that an erroneous decision by the state court is, as it were, an element of the petitioner's claim of right. In contrast, a claimant can bring a general challenge to the rules promulgated by a state without first obtaining a "judgment" under those rules. Therefore, 28 U.S.C. § 1257 poses no barrier to a district court exercising jurisdiction over such a challenge.

Challenges to the constitutionality of state bar rules . . . do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a judicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated. United States district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decision may be had only in this Court. 28 U.S.C. § 1257.

Id. at 486.

Thus, the impetus behind the Court's decision in Feldman is its identification of a class of cases in which res judicata will always constitute a defense to a party's attempt to bring a claim

in federal district court, because the nature of the claim is such that it never arises except as the result of a judicial proceeding in a state court. As the Feldman Court explains, 28 U.S.C. § 1257 strips the federal district courts of jurisdiction over this unusual class of claims, depriving parties of the opportunity to bring their fruitless, always-already-barred claims in that forum.

B.

Judge Rymer reads Feldman much more broadly. She argues that, under Rooker-Feldman, the California Supreme Court's decision in Eu prevents the lower federal courts from ever reviewing the constitutionality of Proposition 140. Since a decision by a federal court on the constitutionality of a state statute would "effectively . . . 'overrule'" the merits of a decision by a state court regarding the same statute, Judge Rymer argues that the federal courts are disabled from ever reviewing the statute once a state court has rendered a final decision on the matter. See supra, Rymer concurrence at 5. So long as "the constitutional challenge raised in the federal court was 'inextricably intertwined' with the state court's decision," id., Judge Rymer would hold that state courts can permanently foreclose review of state statutes in lower federal courts.

Where Judge Rymer goes seriously wrong is in losing sight of the importance of the identity of parties to the application of the Rooker-Feldman doctrine. As the Third Circuit has explained,

"Rooker-Feldman does not bar individual constitutional claims by persons not parties to earlier state court litigation." Valenti v. Mitchell, 962 F.2d 288, 298 (3d Cir. 1992); see also Dubinka, 23 F.3d at 221 (Under Rooker-Feldman analysis, "we must determine whether [a] constitutional claim [is] 'inextricably intertwined' with [a] state court's rulings in a particular plaintiff's case.") (emphasis added). "[T]he interests served by Rooker-Feldman are quite similar to those served by giving a state court judgment res judicata effect in a subsequent federal proceeding." E.B. v. Verniero, 119 F.3d 1077, 1091 (9th Cir. 1997). Thus, the identity of the parties in similar state and federal proceedings is vital to determining what effect, if any, the Rooker-Feldman doctrine will have upon the jurisdiction of a federal district court. Where A and B bring a challenge to the same state statute in the same federal court proceeding, and A, but not B, has already brought a similar challenge against the same party in state court, then Rooker-Feldman may deprive lower federal courts of jurisdiction to hear A's claim, but it will have no impact on their jurisdiction to hear B's claim. This was precisely the result that obtained in Verniero, in which the Third Circuit was called upon by two different sets of litigants to review the constitutionality of "Megan's law," a compulsory notification law for sex-offenders. That court found that Rooker-Feldman deprived the federal courts of jurisdiction over the claim of one litigant, who had already obtained a judgment on the same claim in state court, but had no impact on the claims of other litigants who had not previously brought suit.

There can be no doubt that a federal court's pronouncement the constitutionality of a state statute will have a serious impact on the vitality of previous state-court judgments concerning the same issue. But a litigant cannot invoke the Rooker-Feldman doctrine to prevent a federal court from "review the merits" of a prior state judicial proceeding unless (at a minimum) he and his opponent were both parties to that proceeding just as a litigant cannot raise a defense of res judicata by interposing an earlier judgment unless (at a minimum) his opponent is personally bound by that judgment. It is true that state and federal courts sometimes reach contrary conclusions as to the constitutionality of state statutes. Such clashes are unfortunate, and, as Judge Rymer rightly points out, it is sometimes appropriate for federal courts to abstain from deciding such issues in order to give states a chance to interpret their own statutes and thereby possibly to avoid constitutional problems. See supra, Rymer concurrence at 5 n.1; Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496 (1941). But the Rooker-Feldman doctrine, like the principle of res judicata, is concerned only with preserving the integrity of individual state court judgments, binding upon particular parties, from improper review by lower federal courts. Judge Rymer's attempt to transform this extremely narrow doctrine into an instrument for restructuring the entire relationship between state and federal courts is both unfortunate and misguided.

II.

Given the importance of the right of the citizenry of a state to decide the form that its government will take (within the constraints imposed by the Federal Constitution in Article IV section 4, the Fourteenth Amendment, and elsewhere), I should not think it a remarkable proposition that, when the citizenry is asked to bring about profound changes in that government through a popular referendum, it must have adequate notice of what those profound changes will be. I do not suggest that such a vote may be invalidated simply upon proof that the voters do not understand, or have not made the effort to understand, the meaning of the initiative measure upon which they cast their votes.⁴ I do suggest that such a vote must be invalidated when the state does not provide information sufficient to allow any voter to know what it is that he is voting for.

Judge Rymer makes an important point. The initiative in this case deals with an issue of critical importance to the voters of the state: who will govern, citizen legislators or career

⁴ Judge O'Scannlain purposefully misinterprets my argument. He asserts that I impose a test that would require federal courts to examine whether voters "were capable of understanding what they voted for." Supra, O'Scannlain concurrence at 15. He facetiously notes that he finds no "ignorant voter clause" in the Constitution. Of course, I do not either. Adequate notice is a requirement to assure that the voter has information from which the voter can make an informed judgment. Even the most intelligent and diligent voter must be informed of the intent and effects of that upon which he casts his ballot.

legislators. While we may question the wisdom of submitting the initiative process matters that might be better suited to the regular legislative process that is contemplated by traditional notions of republican government, this issue is, quintessentially, one that should be decided by a citizen vote (restricted, of course, by the demands of the Constitution). It is precisely because the issue before us is of such importance that we inquire whether the voters were given adequate notice of the essential features of the measure. It is in this context that the three-judge panel majority paid close attention to the information furnished to the state.

Several aspects of this litigation have tended to obscure the thoughtful attention that the important issues presented here should receive. Timing is the enemy of us all. Unfortunately, the political ramifications of this case have brought about an unseemly haste, to the detriment of the deliberative process. In addition, the State of California has fundamentally shifted its position between its appearances before the California Supreme Court and before our court, leaving it in an awkward position to say the least. Before the Supreme Court of California, the State vigorously argued that the initiative did not impose lifetime restrictions and urged the Supreme Court of California to ensure the constitutionality of the initiative by construing it to impose restrictions only on consecutive terms. The opponents of the initiative asserted that it was unconstitutional because it imposed a lifetime ban.

Now, before the federal courts, the State of California asserts two propositions: First, that the drafters of the initiative intended that it impose lifetime bans; but second, that a certain degree of ambiguity about the matter is not disqualifying and indeed may be injected purposefully to garner broader support from the voters. It is in this context that I respond to the majority's cursory dismissal of the important issue of the adequacy of the notice to the voters in this case, and to Judge O'Scannlain's suggestion that voters need not be given the information necessary to understand the implication of their votes.

A.

The majority holds that the voters of California received adequate notice that, by voting in favor of Proposition 140, they were voting in favor of a lifetime ban. The majority opinion in the decision by the three-judge panel of this court more fully explains my opposition to that position. See Bates, 127 F.3d at 856-63. However, I add the following comments specifically in response to the majority's and Judge O'Scannlain's analyses.

The majority opinion is incorrect in its assertion that its holding, that the voters received adequate notice of the effect of Proposition 140, is "consistent with the California Supreme Court." Despite Judge O'Scannlain's implication to the contrary, the California Supreme Court did not rule on whether or not the

voters received adequate notice; rather, the court answered only "the interpretive question whether Proposition 140 imposes a 'lifetime ban'." Eu, 816 P.2d at 1314. The task of determining whether or not the voters received notice is fundamentally different from the task of interpreting the meaning of a voter initiative; in the latter context, the California Supreme Court acknowledged that it was concerned only with what the "average" voter "likely" believed. Id. at 1316. Not surprisingly, in making that assessment, the California Supreme Court explicitly admitted that "Proposition 140 is ambiguous as to its intent to impose a lifetime ban." Id. at 1315. It made this statement notwithstanding the State of California's contrary assertion that Proposition 140 "by its terms . . . only limits the number of successive terms which incumbents in the elective offices may serve." Respondents' Brief in Legislature v. Eu ["Eu Brief"] at 4. Surely the adequacy of notice cannot turn on what a person of average intelligence "likely" understood regarding an admittedly ambiguous initiative; notice regarding the effect of one's vote requires clarity, see, e.g., United States v. Bass, 404 U.S. 336, 349 (1971); "careful and purposeful consideration," Greene v. McElroy, 360 U.S. 474, 507 (1959); or "considered evaluation," Hampton v. Mow Sun Wong, 426 U.S. 88, 115 (1976).

The majority also inappropriately looks to the twenty-second amendment to the United States Constitution for support of its position. The twenty-second amendment states that "[n]o person shall be elected to the office of the President more than twice .

... " U.S. Const. amend. XXII (emphasis added). By contrast, Proposition 140 stated, "[n]o Senator may serve more than 2 terms," and "[n]o member of the Assembly may serve more than two terms." (emphasis added). As the state itself pointed out, this distinction has a specific meaning:

This verbal distinction between restrictions on the incumbent office-holder and restrictions on the individual person who at one time holds the office may be found in the constitutions of 18 states which impose term limitations upon their Governors. In each constitution, a restriction on the incumbent while he is an incumbent uses the title of the office . . . while a restriction on the individual which extends after he leaves the office uses the word "person." . . . [The state] knows of no constitution in which the title of an office is used to designate a person after he no longer holds that office.

Eu Brief at 23-24 n.11. Thus, the wording of the twenty-second amendment actually supports the opposite position from that advocated by the majority today. At the very least, it creates a serious question as to the intended meaning of Proposition 140, despite the majority's position that the meaning was clear to the voter.

The majority's reliance on the statements found in the materials distributed by those opposing Proposition 140 is also puzzling. While the opposition did suggest that the enactment of Proposition 140 would result in a lifetime ban, the state and those in favor of Proposition 140 never responded to that allegation. The State in fact never stated to the voters that a lifetime ban was the intent or the effect of the measure. As the

state acknowledged, "this is not particularly surprising" since it allowed the supporters of Proposition 140 to "benefit from the ambiguity." Eu Brief at 21. Indeed, the state in oral argument before the en banc court went so far as to suggest that the voters have a right to vote for ambiguous legislation. Given the state's explicit admission that the state benefits by purposefully refusing to clarify the meaning and effect of an initiative on the ballot, I am amazed that the majority could find that the voters received adequate notice that by voting in favor of Proposition 140, they knew that they were voting to enact a lifetime ban.

Finally, the "surrounding circumstances" did not provide notice to the voters that they were enacting a lifetime ban. The majority relies upon the fact that the voters had two initiatives to choose from on the ballot -- Proposition 140, and Proposition 131. Proposition 131, among other things, imposed consecutive term limit bans. The majority concludes from this fact that voters therefore must have known that because Proposition 131 involved consecutive term limit bans, Proposition 140 involved lifetime bans. I respectfully disagree. As the state itself argued, "[i]t simply cannot be said that the voters rejected Proposition 131 solely because the term limitation provisions of that measure" imposed a consecutive rather than a lifetime ban. Eu Brief at 25 n.13. Proposition 131 "covered several, complex issues" and was different from Proposition 140 in significant ways concerning funding and revenues. While editorials and the opponents' materials compared the effect of the two propositions

in terms of the severity of the term limitations imposed by each, it cannot be said that such materials constitute "notice," particularly in the face of not a single reference to a lifetime ban in the text of the amendment, the proponents' ballot arguments, or the official statement prepared by the state.⁵

B.

The evidence upon which the majority relies suggests at best that some of those who voted in favor of or against Proposition 140 believed that by doing so, they were voting in favor of or against a lifetime ban.⁶ It necessarily follows, however, that others who voted in favor of or against the proposition had no

⁵ The majority's reliance on Taxpayers to Limit Campaign Spending, 799 P.2d at 1220, is misplaced. In that case, the California Supreme Court considered what to do when two voter initiatives, both dealing with campaign finance, received more than 50 percent affirmative votes. The court held that no part of the ballot initiative receiving the fewer affirmative votes could take effect. 799 P.2d at 1221. While that ruling apparently was interpreted by the press as potentially affecting what would happen if both Proposition 131 and Proposition 140 were passed, that does not constitute notice that Proposition 140 involved a lifetime ban.

⁶ I also note that some of the evidence relied upon by the en banc majority was not relied upon by the California Supreme Court, despite the majority's statement that its decision is "consistent" with that of the California Supreme Court. The latter looked only to the Legislative Analyst's analysis and the opponents' materials in interpreting the meaning of Proposition 140 and concluding that it imposed a lifetime ban. See Eu, 816 P.2d at 1315. The California Supreme Court specifically rejected the notion that the wording of the amendment made it clear what type of ban was contemplated by Proposition 140. See id. Nor did the Eu court look to the effect of having Proposition 131 on the same ballot, or to the attention Proposition 140 received from the media.

notice that they were voting in favor of or against a lifetime ban and so had no notice that they were voting on a severe limitation to their fundamental right to vote for candidates of their choice. Reynolds, 377 U.S. at 555. We ask little of the state when we request that it give voters adequate notice of the effect of their vote, particularly when the state asks voters to restrict their own fundamental rights. In contrast, the state loses little when we take away the advantage it gains by fostering an ambiguity as to the effect of a voter initiative.

As Judge Rymer's concurrence appropriately emphasizes, "decisions about how people are to participate in their own representative government and how they choose to represent themselves is 'the very essence of all self-government.'" See supra, Rymer concurrence at 9 (quoting Laurence H. Tribe, American Constitutional Law 398 (2d ed. 1988)) (emphasis in original). Ironically, however, the majority would have the voters of California make those decisions while having to guess at the likely outcome of their votes, having to rely upon newspaper editorials and materials circulated by the opponents of the voter initiatives, rather than upon the plain language of the initiative itself and the explanatory materials produced by the state. It is difficult to determine how the right to vote -- particularly the right to vote on issues affecting one's own fundamental rights -- can be meaningful when the state is allowed to force people to vote at their peril rather than add a few simple words to clarify

candidates' support in the electoral process." Id. The clear import of the Court's analysis in Thornton is that lifetime term limits cannot enjoy the deferential review that the ballot-access cases reserve to those procedural reforms that "impose only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters." Burdick, 504 U.S. at 434. Indeed, Thornton could be read for the broad proposition that the ballot-access cases are simply inapplicable to qualification regulations, of which lifetime term limits are an example. See supra, Rymer concurrence at 12. It at least stands for the narrower proposition that, even under the ballot-access cases, lifetime term limits have the effect of "disadvantaging a particular class of candidates," Thornton, 514 U.S. at 835, and hence provoke searching judicial review. See Anderson, 460 U.S. at 793. Under either interpretation, Thornton forecloses the deferential approach that the majority has adopted in this case.

B.

Before going on to discuss the constitutionality of Proposition 140 under the stricter standard that Thornton requires us to employ, I think it appropriate to explore further the Supreme Court's conclusion that lifetime term limits discriminate against "a particular class of candidates." Thornton, 514 U.S. at 835. The majority in Thornton apparently took this to be a self-evident proposition, but, as the district court in the present case aptly observed, "the terms 'reasonable' and

notice that they were voting in favor of or against a lifetime ban and so had no notice that they were voting on a severe limitation to their fundamental right to vote for candidates of their choice. Reynolds, 377 U.S. at 555. We ask little of the state when we request that it give voters adequate notice of the effect of their vote, particularly when the state asks voters to restrict their own fundamental rights. In contrast, the state loses little when we take away the advantage it gains by fostering an ambiguity as to the effect of a voter initiative.

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the position for or against which they are being asked to cast their ballots.

III.

The majority disposes of the merits of petitioner's constitutional challenge to lifetime term limits in an opinion that barely spans one page of the federal reporter. The majority apparently believes that plaintiffs' challenge presents an easy question. I find the question to be an extremely difficult one.

A.

When a court is called upon to analyze the constitutionality of restrictive qualifications imposed by a state upon candidates for office, it faces a dilemma to which the Supreme Court has not yet offered any answer: How is the court to determine whether a qualification is a "proper" one or not? It seems clear that some qualifications are eminently "proper" and should not require any extraordinary justification by a State in order to survive scrutiny. A requirement that candidates be adults, for example, or that they actually reside in the districts that they seek to represent, fits with our understanding of the most basic of requirements in a representative democracy: That candidates for office be citizens who are willing and able to represent the interests of a particular community. Any constitutional analysis that would require a State to offer a highly particularized

explanation for imposing basic age and residency requirements upon candidates for elective office would be extraordinarily invasive.

Even so, the Supreme Court has at least suggested that such an invasive analysis may be called for. On a number of occasions, the Court has emphasized the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'" Powell v. McCormack, 395 U.S. 486, 547 (1969). "The people are the best judges who ought to represent them," the Court has written, and "[t]o dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." U.S. Term Limits v. Thornton, 514 U.S. 779, 794-95 (1995) (quoting 2 Elliot's Debates 292-93 (statement of Robert Livingston)). Indeed, the Court has gone so far as to say that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964) (emphasis added). Taken literally, these ringing phrases would suggest that every attempt by a state to set restrictive qualifications concerning who can and who cannot serve as a candidate for elective office implicates rights that are "fundamental" and requires careful scrutiny by a reviewing court.

It will not do to respond that the Court has only meant to secure to voters the right to vote for the qualified candidate of their choice, for this merely begs the question, what

qualifications may a State impose? By narrowing the field of candidates who are eligible to run for office, lifetime term limits might permanently deprive an entire legislative district of the opportunity to vote for the otherwise-"qualified" candidate of its choice, even if that district had overwhelmingly opposed the imposition of term limits in the first place. Ascertaining the constitutional principles that should govern such a dilemma is of the highest importance. The qualifications for federal legislative office are absolutely fixed in the Constitution. See U.S. Const., Art. I § 2 cl. 2-3; Thornton, 514 U.S. at 837-38. There are no such clear constitutional guideposts for state legislators. Thus, unless the Court means for lower federal courts to take literally its stirring pronouncements concerning "[t]he right to vote freely for the candidate of one's choice," Reynolds, 377 U.S. at 555, these repeated, powerful statements do not aid in answering the basic question that is before us: How is the court to determine whether a qualification is a "proper" one or not?

The majority rests its conclusion that states may freely impose lifetime term limits upon state elected officials primarily upon its assertion that "term limits on state officeholders is a neutral candidacy qualification," one that "[does] not constitute a discriminatory restriction." Majority opinion at 8, 9. The majority looks to the Supreme Court's cases involving restrictions on candidate access to voting ballots for the proposition that "the State's important regulatory interests are generally

sufficient to justify" such restrictions, provided that they are "reasonable" and "nondiscriminatory." Burdick v. Takushi, 504 U.S. 428, 434 (1992). The majority concludes that Proposition 140 does not "limit[] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status," Majority opinion at 9 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)), and hence that lifetime term limits do not provoke any searching judicial scrutiny.⁷

I find the majority's analysis problematic, at best. In my view, U.S. Term Limits v. Thornton forecloses the analytical approach that the majority invokes. As the majority points out, Thornton involved a challenge to an attempt by the State of Arkansas to impose term limits on members of the U.S. Congress. That attempt raised serious concerns under the Qualifications

⁷ Judge O'Scannlain vigorously urges the position that the Supreme Court's summary dismissal in Moore v. McCartney is such "compelling authority" for the issues before us that there is not even a federal question for us to decide and we should dismiss for want of jurisdiction. See supra, O'Scannlain concurrence at 1-8. Judge O'Scannlain's own presentation of his argument provides a sufficient basis for disregarding it, however. Moore was a case about consecutive term limits, not a lifetime ban. The petitioner in that case -- the Governor -- made no claims under the First Amendment; indeed, there were no voters joined as parties in the case at all, see Maloney v. McCartney, 223 S.E.2d 607, 610-11 (W. Va. 1976), raising a serious question as to whether the case presented a federal voting rights issue over which the Court could exercise jurisdiction. The case was a summary dismissal and has been followed by twenty years of First Amendment opinions in the related field of candidate restrictions. Judge O'Scannlain's only authority for the proposition that Moore should even inform the present inquiry is Justice Thomas' dissenting opinion in Thornton.

Clauses, U.S. Const., Art. I § 2 cl. 2-3, concerns which are not implicated here, and the Court rested its holding in Thornton primarily upon its analysis of those particular concerns. During the course of its opinion, however, the Court also examined the Arkansas amendment in light of its ballot-access line of cases, finding that there was nothing in those cases that could save the challenged amendment. See Thornton, 514 U.S. at 834-35. That analysis is entirely at odds with the approach that the majority has adopted in this case.

The State of Arkansas argued in Thornton that its attempt to impose term limits on members of Congress was in fact nothing more than a permissible exercise of its power, under the Elections Clause of the Federal Constitution, to regulate the "Times, Places and Manner" of federal elections. U.S. Const., Art. I § 4 cl. 1; see Thornton, 514 U.S. at 832. In rejecting that argument, the Court looked to its ballot-access cases and explained that the types of regulatory procedures that those cases involved (many of which constituted permissible regulations under the Elections Clause) were qualitatively different from the imposition of a qualification for candidacy in the form of a lifetime term limitation. As the Court explained, "[t]he provisions at issue in [the ballot-access / Elections Clause cases] were . . . constitutional because they regulated election procedures and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position." Thornton, 514 U.S. at 835. .

candidates' support in the electoral process." Id. The clear import of the Court's analysis in Thornton is that lifetime term limits cannot enjoy the deferential review that the ballot-access cases reserve to those procedural reforms that "impose only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters." Burdick, 504 U.S. at 434. Indeed, Thornton could be read for the broad proposition that the ballot-access cases are simply inapplicable to qualification regulations, of which lifetime term limits are an example. See supra, Rymer concurrence at 12. It at least stands for the narrower proposition that, even under the ballot-access cases, lifetime term limits have the effect of "disadvantaging a particular class of candidates," Thornton, 514 U.S. at 835, and hence provoke searching judicial review. See Anderson, 460 U.S. at 793. Under either interpretation, Thornton forecloses the deferential approach that the majority has adopted in this case.

B.

Before going on to discuss the constitutionality of Proposition 140 under the stricter standard that Thornton requires us to employ, I think it appropriate to explore further the Supreme Court's conclusion that lifetime term limits discriminate against "a particular class of candidates." Thornton, 514 U.S. at 835. The majority in Thornton apparently took this to be a self-evident proposition, but, as the district court in the present case aptly observed, "the terms 'reasonable' and

'nondiscriminatory' [and their converse] are not self-defining." Bates v. Jones, 958 F. Supp. 1446, 1462 (N.D. Cal. 1997). Justice Kennedy took up this question in Thornton at somewhat greater length than did the majority, explaining that lifetime term limits had the dubious effect of burdening the rights of voters⁸ based on the manner in which they had exercised the franchise in past elections.

Not the least of the incongruities in the position advanced by Arkansas is the proposition, necessary to its case, that it can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised it. If the majority of the voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future.

Thornton, 514 U.S. at 844 (Kennedy, J., concurring).. Justice Kennedy made this observation during the course of a discussion about the burden Arkansas had placed upon federal voting rights, but he also cited Anderson and suggested that the restriction raised "First Amendment concerns." Id. Indeed, the concern that Justice Kennedy expressed over a restriction on the right to vote or hold office that looks to "the manner in which [a voter or candidate] earlier had exercised" that right, id., echoes the Thornton majority's suspicion of "measures that exclude candidates

⁸ As the Court has explained, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Bullock v. Carter, 405 U.S. 134, 143 (1972).

from the ballot without reference to the candidates' support in the electoral process." Id. at 835.

In its ballot-access cases, the Court has admonished federal courts to "examine in a realistic light the extent and nature of [candidate restrictions'] impact on voters." Anderson, 460 U.S. at 786 (quotation omitted). On the most basic level, as the district court in the present case observed, "Proposition 140 prevents [California voters] from expressing their political preference for candidates with legislative experience." Bates, 958 F. Supp. at 1463. "California voters who value legislative experience . . . are not simply required to defer expressing their preference, they are forever prevented from expressing their preference at the ballot box." Id. The district court found that this impact alone was enough to warrant strict scrutiny under Anderson and Burdick, a conclusion that was surely warranted in light of the Supreme Court's conclusion that lifetime term limits "disadvantag[e] a particular class of candidates." Thornton, 514 U.S. at 835.

Even so, this explanation, without more, is not wholly satisfactory. The implicit rejoinder of the majority's analysis is an attractive one, at least on its face. Term limits affect all candidates equally, without regard to the candidates' parties, their political affiliations, or their resources. Thus, on their face, term limits do not seem to disadvantage any particular class of voters, unless we can say that there are voters who value

legislative experience, not merely for the incumbency-based benefits that it can confer upon fortunate districts, but as a political and ideological reason for selecting a representative. I do not doubt that there are some voters who value legislative experience for precisely this reason. It is not self-evident, however, that such voters constitute a "particular class." There surely are at least some voters who value candidates, on an ideological level, for reasons that would be implicated by the ballot-access restrictions that the Court has upheld in the past. I can easily imagine, for example, that there are voters (albeit few) who might have principled reasons for trusting only a candidate who refuses to take part in any organized balloting and primary activities, instead insisting that he be elected, if at all, by popular acclaim through the write-in process. Cf. Burdick, 504 U.S. at 435-36. How, then, is a court to decide, in a close case, when a restriction has the disfavored effect of "disadvantaging a particular class of candidates?" Thornton, 514 U.S. at 835.

I am persuaded that the animating force behind the Court's conclusion in Thornton that term limits have this effect is its observation that term limits "exclude candidates from the ballot without reference to the candidates' support in the electoral process." Id. (emphasis added). The regulations that the Court has upheld in its ballot-access cases have been aimed at "seeking to assure that elections are operated equitably and efficiently," Burdick, 504 U.S. at 433, and at "protect[ing] the integrity and

What the Court suggested in Thornton, however, was that a "measure[] that exclude[s] candidates from the ballot without reference to the candidates' support in the electoral process," Thornton, 514 U.S. at 835, is asking the wrong type of question, at least as far as the ballot-access cases are concerned. A restriction that imposes a "substantive qualification rendering a class of potential candidates ineligible for ballot position," id., always carries with it the danger that particular classes of voters will be disadvantaged, perhaps in ways that will be difficult to foresee. The ballot-access cases, Thornton suggests, represent a compromise under which states are permitted to pass restrictions aimed at protecting the electoral process, but only so long as those restrictions limit themselves to asking about a candidate's level of engagement and support in that process itself. See id. If the burdens that the restriction imposes are not too severe, then the restriction will enjoy a presumption of validity. If the restriction disadvantages candidates for reasons having nothing to do with a lack of engagement and support in the electoral process, however, then that presumption of validity disappears. At that point, the "fundamental principle . . . 'that the people should choose whom they please to govern them,'" Powell v. McCormack, 395 U.S. 486, 547 (1969), reasserts itself and requires courts to look closely at the challenged restriction. Such is the case with lifetime term limits, which prevent candidates from running for office precisely because they are engaged with the political process and have found considerable support in it. See Thornton, 514 U.S. at 844 (Kennedy, J.,

concurring). We cannot accord such a regulation a casual presumption of validity. Rather, we must weigh it carefully against the interests that the State asserts in its defense.

C.

I recognize the uniquely compelling interest that states enjoy in experimenting with new forms of republican government under our federal system. Judge Rymer provides an account of that interest in her opinion that is powerful. See supra, Rymer concurrence at 9-11. As Justice Brandeis has famously written, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As Judge Rymer explains, this principle is applicable to political reform as well, for, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); see supra, Rymer concurrence at 10-11.

In this regard, a limitation on the number of terms that a candidate may serve in state government implicates federalism interests that pull in the opposite direction from the federalism interests implicated by a similar restriction on elected federal officials. As the Court explained in Thornton, it was of central

concern to the Framers of our Constitution that the States enjoy a relationship to the federal government that would not vary from state to state in order that they might be unified into a single, stable Republic. See Thornton, 514 U.S. 806-07. "Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure." Id. at 822. Rather, it is the bedrock of stability that our uniform federal government offers that in turn makes it possible for States to experiment safely with novel approaches to intractable social, economic and political problems. The principle of federalism thus weighs heavily in favor of allowing California to experiment with a government of "citizen legislators" like the one that Proposition 140 envisions.

It is necessary, however, to articulate some limitations on the ability of States to alter their structure of government on the strength of these federalism interests. Unfortunately, the ordinary paradigm of strict scrutiny analysis is not helpful in this regard. Once it is acknowledged that the States have a compelling interest in experimenting with new forms of government, the concept of "narrow tailoring" has limited application, for any novel governmental structure is, by definition, narrowly tailored to the goal of experimenting with that particular governmental structure. But the States do not have a completely free hand in

representatives who will represent their interests and promote their political ideals.

When "there is a serious factual controversy over the feasibility of recognizing [a] claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power," Washington v. Glucksberg, 117 S. Ct. 2258, 2292 (1997) (Souter, J., concurring), it may sometimes be appropriate for federal courts to deny a claim of right while remaining open to reaching a different conclusion if a demonstrable infringement on individual liberties can later be shown. This principle holds especially true when the organization of our federal system is at issue, since one of the very purposes of that system is to foster investigation and experimentation by state legislatures. See id. at 2293 (Souter, J., concurring); Glucksberg, 117 S. Ct. at 2303 (O'Connor, J., concurring). At a minimum, I suggest that the majority should recognize that what it does today is to validate an experiment that may not prove out. If experience demonstrates that the predicate that underlies the majority's decision is incorrect, and that lifetime term limits consistently disadvantage a particular class of voters on the basis of an articulable political ideology, then our court should remain open to revisiting its holding.

* * *

I voice my strong dissent from the majority's view that the voters of California received adequate notice from the State regarding the true import of their vote on Proposition 140. From reading their opinion, one might conclude also that the majority did not appreciate either the gravity or the closeness of the issues upon which they were called to deliberate.

▷

Bill JONES, Secretary of the State of California,
Defendant-Appellant,
and

Peter F. Schabarum; Lewis K. Uhler,
Intervenors-Appellants,

v.

Tom BATES; Edward H. Lyman; Richard D.
Lewis; Lawrence J. Buchalter;
Jonathan Browning; Rachel Sherman, Plaintiffs-
Appellees,

and

NATIONAL TAX LIMITATION COMMITTEE;
Alliance of California Taxpayers & Involved
Voters, Intervenors,

v.

Bill JONES, Secretary of the State of California,
Defendant-Appellant.

No. 97-15914.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 7, 1997.

Decided Oct. 7, 1997.

State legislator and voters brought action for declaratory and injunctive relief against Secretary of State of California, challenging state constitutional amendment establishing term limits for state legislators. Plaintiffs moved for preliminary injunction, amendment's official proponents moved to intervene and to dismiss, and Secretary moved to dismiss. The United States District Court for the Northern District of California, Claudia Wilken, J., 904 F.Supp. 1080, denied injunction and dismissal motions and granted motion to intervene. Following trial, the District Court, 958 F.Supp. 1446, granted declaratory judgment and permanent injunction against enforcement of term limits. Secretary and intervenors appealed. The Court of Appeals, Reinhardt, Circuit Judge, as a matter of first impression, held that: (1) as a matter of federal law, State of California could not enforce lifetime legislative term limits arising from ballot initiative amending State Constitution; (2) privity did not exist, for collateral estoppel purposes, between plaintiffs and petitioners in prior state action challenging same constitutional amendment; and (3)

even assuming that requirements for collateral estoppel were satisfied, application of California's public interest exception to collateral estoppel was warranted.

Affirmed.

Sneed, Circuit Judge, dissented and filed a separate opinion.

[1] CONSTITUTIONAL LAW Ⓒ9(1)
92k9(1)

As a matter of federal constitutional due process law, state initiative measure cannot impose severe limitation on the people's fundamental rights when issue of whether to impose such limitation on those rights is put to voters in measure that is ambiguous on its face and that fails to mention in its text, proponents' ballot arguments, or state's official descriptions, severe limitation to be imposed. U.S.C.A. Const.Amend. 14.

[1] CONSTITUTIONAL LAW Ⓒ274.2(1)
92k274.2(1)

As a matter of federal constitutional due process law, state initiative measure cannot impose severe limitation on the people's fundamental rights when issue of whether to impose such limitation on those rights is put to voters in measure that is ambiguous on its face and that fails to mention in its text, proponents' ballot arguments, or state's official descriptions, severe limitation to be imposed. U.S.C.A. Const.Amend. 14.

[2] FEDERAL CIVIL PROCEDURE Ⓒ392
170Ak392

State legislator and voters challenging state constitutional amendment imposing term limits on state legislators were properly granted leave to amend complaint to add as plaintiffs additional assembly members and voters from those members' respective districts; original plaintiffs did not act in bad faith in amending pleadings, and motion to amend was not untimely or repetitious, but was made to ensure that claims already presented would be decided on their merits. West's Ann.Cal. Const. Art. 4, § 2(a); Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[3] FEDERAL CIVIL PROCEDURE Ⓒ833

170Ak833

Rule governing amended pleadings directs court freely to grant party leave to amend its complaint "when justice so requires" and should be applied with extreme liberality. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE ⚡824

170Ak824

Delay alone is insufficient to justify denial of leave to amend pleadings; party opposing amendment must also show that amendment sought is futile, in bad faith, or will cause undue prejudice to opposing party. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE ⚡834

170Ak834

Delay alone is insufficient to justify denial of leave to amend pleadings; party opposing amendment must also show that amendment sought is futile, in bad faith, or will cause undue prejudice to opposing party. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE ⚡851

170Ak851

Delay alone is insufficient to justify denial of leave to amend pleadings; party opposing amendment must also show that amendment sought is futile, in bad faith, or will cause undue prejudice to opposing party. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[5] CONSTITUTIONAL LAW ⚡42.3(3)

92k42.3(3)

State assembly members had standing, and thus were properly added as plaintiffs in action challenging state constitutional amendment imposing term limits on state legislators, in that they demonstrated adequate likelihood of future injury for justiciability purposes merely by alleging their desire to run in particular election for fourth term in assembly. West's Ann.Cal. Const. Art. 4, § 2(a).

[6] JUDGMENT ⚡828.14(7)

228k828.14(7)

Privity did not exist, for collateral estoppel purposes, between state legislator and voters challenging state constitutional amendment imposing term limits on state legislators and petitioners in prior state action challenging same amendment;

there was no identity of interests between petitioners and voters, neither legislator nor voters were on notice that their First Amendment rights would be foreclosed by prior action, petitioners did not adequately represent interests of legislator and voters, and neither legislator nor voters enjoyed any control over petitioners' unsuccessful litigation strategies.

[7] FEDERAL COURTS ⚡776

170Bk776

Court of Appeals reviews questions of res judicata and collateral estoppel de novo.

[8] JUDGMENT ⚡720

228k720

Under California law, collateral estoppel bars parties from relitigating issues of fact or law that have already been fully and fairly litigated in prior proceedings.

[9] JUDGMENT ⚡634

228k634

Under California law, party asserting collateral estoppel must demonstrate that factual or legal issue is identical to issue that was previously litigated, that issue was actually litigated in prior proceeding and there was final judgment on the merits, and that party to be estopped in current action was in privity with party in former proceeding.

[10] JUDGMENT ⚡678(2)

228k678(2)

Under California law, "privity" generally refers to persons who are so identified in interest with parties to original action that it is proper to bind them along with parties to original litigation.

See publication Words and Phrases for other judicial constructions and definitions.

[11] CONSTITUTIONAL LAW ⚡315

92k315

Due process requires, at a minimum, that party to be estopped under collateral estoppel must have had identity or community of interest with, and adequate representation by, losing party in first action, and should reasonably have expected to be bound by prior adjudication. U.S.C.A. Const.Amend. 5.

[11] JUDGMENT ⚡678(1)

228k678(1)

Due process requires, at a minimum, that party to

be estopped under collateral estoppel must have had identity or community of interest with, and adequate representation by, losing party in first action, and should reasonably have expected to be bound by prior adjudication. U.S.C.A. Const.Amend. 5.

[12] CONSTITUTIONAL LAW ⇨315
92k315

In determining whether nonparty had identity of interest with, and adequate representation by, losing party in prior action, for purposes of privity requirement for collateral estoppel, due process requires both that prior litigation of issue have been motivated by same underlying purposes, and that original party have had incentive and opportunity to litigate issue in manner best suited to furthering those common underlying purposes. U.S.C.A. Const.Amend. 5.

[12] JUDGMENT ⇨678(1)
228k678(1)

In determining whether nonparty had identity of interest with, and adequate representation by, losing party in prior action, for purposes of privity requirement for collateral estoppel, due process requires both that prior litigation of issue have been motivated by same underlying purposes, and that original party have had incentive and opportunity to litigate issue in manner best suited to furthering those common underlying purposes. U.S.C.A. Const.Amend. 5.

[13] CONSTITUTIONAL LAW ⇨315
92k315

With regard to due process requirement that, to find privity for purposes of collateral estoppel, nonparty should reasonably have expected to be bound by prior action, such notice requirement is satisfied if nonparty had received actual notice at time of litigation that his interests were being litigated, nonparty had in reality contested prior action even if he did not make formal appearance, such as when nonparty had financial interest in and power to control litigation of prior action, or unsuccessful party in first action could fairly be treated as acting in representative capacity for nonparty now being precluded. U.S.C.A. Const.Amend. 5.

[13] JUDGMENT ⇨675(1)
228k675(1)

With regard to due process requirement that, to find privity for purposes of collateral estoppel, nonparty

should reasonably have expected to be bound by prior action, such notice requirement is satisfied if nonparty had received actual notice at time of litigation that his interests were being litigated, nonparty had in reality contested prior action even if he did not make formal appearance, such as when nonparty had financial interest in and power to control litigation of prior action, or unsuccessful party in first action could fairly be treated as acting in representative capacity for nonparty now being precluded. U.S.C.A. Const.Amend. 5.

[13] JUDGMENT ⇨677
228k677

With regard to due process requirement that, to find privity for purposes of collateral estoppel, nonparty should reasonably have expected to be bound by prior action, such notice requirement is satisfied if nonparty had received actual notice at time of litigation that his interests were being litigated, nonparty had in reality contested prior action even if he did not make formal appearance, such as when nonparty had financial interest in and power to control litigation of prior action, or unsuccessful party in first action could fairly be treated as acting in representative capacity for nonparty now being precluded. U.S.C.A. Const.Amend. 5.

[14] JUDGMENT ⇨678(2)
228k678(2)

That plaintiffs challenging state constitutional amendment were represented by same law firm as that which had represented petitioners challenging same amendment in prior state case was irrelevant to determination of whether collateral estoppel applied to bar plaintiffs' action; it could not be inferred that parties shared same interests or would choose same strategies simply due to their representation by same attorneys.

[15] JUDGMENT ⇨828.14(7)
228k828.14(7)

That state legislator's campaign committee contributed minute fraction of costs of prior litigation challenging state constitutional amendment did not establish privity necessary for collateral estoppel to bar action brought by legislator and others to challenge same amendment.

[16] JUDGMENT ⇨828.1
228k828.1

Even assuming that requirements for collateral

estoppel were met with regard to action challenging state constitutional amendment imposing term limits on state legislators, application of California's public interest exception to collateral estoppel was warranted by overwhelming public importance of issues involved, by numbers of persons whose fundamental rights were severely limited by prior action, which was writ proceeding that was conducted primarily between governmental entities and bypassed ordinary judicial procedures, and by existence of intervening, clarifying authority. West's Ann.Cal. Const. Art. 4, § 2(a).

[17] JUDGMENT ⇨713(1)

228k713(1)

Under California law, even when formal prerequisites for collateral estoppel are present, public interest may require that relitigation of certain questions of law not be foreclosed.

[18] JUDGMENT ⇨713(1)

228k713(1)

Under California law, initial determination of issue need not be erroneous to warrant reexamination under "public interest" exception to res judicata; rather, reexamination of previously decided legal question is appropriate when potential adverse impact on public or persons who were not parties to previous action demonstrates convincing need for new determination of issue.

[19] COURTS ⇨107

106k107

Summary dismissal by United States Supreme Court for want of substantial federal question is decision on the merits, but is controlling only on precise issues presented and necessarily decided.

[20] STATES ⇨24.1

360k24.1

States are not free to create their legislative structures in violation of constitutional restraints.

[21] CONSTITUTIONAL LAW ⇨68(1)

92k68(1)

States may not insulate from judicial review their decisions regarding their political structures by claiming that they present nonjusticiable political questions.

[22] FEDERAL COURTS ⇨12.1

170Bk12.1

Constitutional claims are not rendered nonjusticiable merely because they touch matters of state governmental organization.

[23] ELECTIONS ⇨1

144k1

Inasmuch as state legislatures are, historically, the fountainhead of representative government in this country, right to vote freely for candidate of one's choice applies with equal force in state as well as federal elections.

[24] CONSTITUTIONAL LAW ⇨82(8)

92k82(8)

Lifetime ban on people's right to vote for legislators of their choice imposed by ballot initiative amending State Constitution to provide for term limits on state legislators did not simply handicap rights of individuals; it violated fundamental principle of representative democracy that people should choose whom they please to govern them. West's Ann.Cal. Const. Art. 4, § 2(a).

[24] STATES ⇨28(1)

360k28(1)

Lifetime ban on people's right to vote for legislators of their choice imposed by ballot initiative amending State Constitution to provide for term limits on state legislators did not simply handicap rights of individuals; it violated fundamental principle of representative democracy that people should choose whom they please to govern them. West's Ann.Cal. Const. Art. 4, § 2(a).

[25] STATES ⇨28(1)

360k28(1)

Language of ballot initiative proposing term limits on state legislators was ambiguous as to its intent to impose lifetime ban, in that use of terms "senator" and "member of the Assembly" in defining who was subject to limits permitted measure to be read both as imposing consecutive term limits and lifetime ban.

[26] FEDERAL COURTS ⇨192

170Bk192

Although proper interpretation of ballot initiative for constitutional amendment imposing term limits on state legislators was purely matter of state law, issue of whether people's fundamental political rights could have been severely burdened by means of "ambiguous" initiative that "average voter" would

only "likely" understand was question of federal law. West's Ann.Cal. Const. Art. 4, § 2(a).

[27] CONSTITUTIONAL LAW ⇨48(1)

92k48(1)

California rule for construing initiatives requires courts to indulge all presumptions in favor of validity of initiative measures

[28] CONSTITUTIONAL LAW ⇨82(8)

92k82(8)

When restriction severely limits fundamental voting rights, courts must assess state's interests in doing so with great care.

[29] CONSTITUTIONAL LAW ⇨274.2(3)

92k274.2(3)

When fundamental, constitutional rights, such as voting rights, are at stake in election process, basic tenets of procedural due process require states to adopt minimally burdensome safeguards if there is significant risk of erroneous deprivation of such right. U.S.C.A. Const.Amend. 14.

[30] CONSTITUTIONAL LAW ⇨254.1

92k254.1

Fundamental rights qualify as liberty interests, triggering protections of Fourteenth Amendment's Due Process Clause. U.S.C.A. Const.Amend. 14.

[31] CONSTITUTIONAL LAW ⇨274.2(1)

92k274.2(1)

State of California has constitutional due process obligation to ensure fairness of its elections, including those involving initiative process. U.S.C.A. Const.Amend. 14.

[32] MANDAMUS ⇨74(1)

250k74(1)

Under California law, when attorney general has already provided impartial statement of ballot initiative, voter may not compel writ to require him fully to state main purpose or chief point of initiative. West's Ann.Cal.Elec.Code § 9092.

[33] FEDERAL COURTS ⇨386

170Bk386

Interpretation of state statute by state's highest court puts words into statute as definitely as if it had been so amended by legislature.

[34] CONSTITUTIONAL LAW ⇨82(8)

92k82(8)

As a matter of federal law, State of California could not enforce lifetime legislative term limits arising from ballot initiative amending State Constitution, inasmuch as initiative imposed severe limitation on people's fundamental right to elect whomever they chose and voters were not provided with adequate notice of that limitation, as required by due process. U.S.C.A. Const.Amends. 1, 14; West's Ann.Cal. Const. Art. § 4, § 2(a).

[34] CONSTITUTIONAL LAW ⇨274.2(3)

92k274.2(3)

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[34] STATES ⇨28(1)

360k28(1)

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[35] CONSTITUTIONAL LAW ⇨274.2(3)

92k274.2(3)

When state uses initiative to adopt form of governmental structure that severely burdens fundamental rights of voting and association, due process requires that state give voters notice of limitation that measure would impose. U.S.C.A. Const.Amends. 1, 14.

[36] FEDERAL COURTS ⇨433

170Bk433

California Supreme Court's determination that constitutional amendment resulting from ballot initiative imposed lifetime ban with regard to legislative term limits prevented Court of Appeals from narrowly construing initiative, potentially to save its constitutionality; Court of Appeals had to

take statute as though it read precisely as California Supreme Court interpreted it. West's Ann.Cal. Const. Art. § 4, § 2(a).

[37] CONSTITUTIONAL LAW ⇨49
92k49

Court of Appeals could not, under California law, sever lifetime limits requirement of ballot initiative that resulted in constitutional amendment imposing term limits on state legislatures, in that there was no lifetime limits "provision" that was mechanically and grammatically separable. West's Ann.Cal. Const. Art. § 4, § 2(a).

[38] STATUTES ⇨64(1)
361k64(1)

Severability of statute is question of state law.

[39] STATUTES ⇨64(1)
361k64(1)

California law prescribes three criteria for severability of partially invalid law: invalid provision must be mechanically and grammatically separable, it must be functionally separable, and remainder of law would have been adopted by legislative body if it had foreseen partial invalidity of law.

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Appeal from the United States District Court for the Northern District of California; Claudia Wilken, District Judge, Presiding. D.C. No. 95-CV-02638-CW.

Before: SNEED, FLETCHER, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

This case involves a deep and seemingly intractable conflict between principles at the heart of our representative government: the right of the people to choose whom they please to govern them, and the authority of a state to determine the structure of its political system. It also raises the novel question whether, when the people vote on an initiative measure that, if enacted, would severely limit a fundamental, constitutional right, they must be given adequate notice of the measure's effect.

In 1990, by a narrow margin, California voters passed Proposition 140, which, as construed by the California Supreme Court, amends the California Constitution to impose a lifetime limit on the number of terms that an individual may serve in state legislative office. The plaintiffs in this case—who consist *844 of former state legislators who are permanently barred by Proposition 140 from ever seeking re-election to the house in which they served, and residents of their respective districts who can never again vote to re-elect state legislators barred by Proposition 140—together allege that Proposition 140's lifetime term limits impose an unconstitutional burden on their fundamental rights of voting and association under the First and Fourteenth Amendments. The district court agreed and invalidated the provision.

[1] We affirm the judgment, but not the rationale, of the district court. We do not decide whether a state may adopt lifetime term limits for its legislators without violating the Constitution. We recognize that the state has a compelling interest as a sovereign in choosing the structure of its institutions and the qualifications of its officials—an interest that may suffice to render lifetime term limits constitutional, although we do not decide that question here. Instead, we invalidate the challenged lifetime ban because we hold as a matter of federal constitutional law that a state initiative measure cannot impose a severe limitation on the people's fundamental rights when the issue of whether to impose such a limitation on those rights is put to the voters in a measure that is ambiguous on its face and that fails to mention in its text, the proponents' ballot arguments, or the state's official descriptions, the severe limitation to be imposed. Neither Proposition 140, the proponents' ballot arguments, nor the material prepared by the state mentioned

"lifetime" term limits; thus, the voters were not afforded adequate notice of the severity of the limitation involved.

BACKGROUND

On November 6, 1990, California voters narrowly passed Proposition 140, which amended the California Constitution to limit the number of terms that individuals may serve in certain state offices, to curtail the retirement benefits of state legislators, and to reduce or eliminate legislative staff and support services. Cal. Const. art. IV, § 2(a) (term limits for state legislators); id. § 4.5 (retirement benefits for state legislators); id. § 7.5 (operating expenses of legislature and compensation of legislature members and staff); see also id. art. V, § 2 (gubernatorial term limits); id. art. V, § 11, art. IX, § 2, art. XIII, § 17 (term limits for other state executive officials). Although other state offices were affected, the thrust of the measure was clearly aimed at adopting term limits for the state legislature. [FN1]

FN1. Although the measure contains a number of other provisions, it is obvious that the measure's primary focus is the legislative-term-limits provision. The term-limits provision is the first item mentioned in the measure's title, the measure itself, and in the ballot arguments. In fact, the measure's proponents dedicated seven and one-half of its ten-paragraph ballot argument to debating the merits of legislative term limits (without mentioning that the limits to be imposed by the measure were lifetime). Moreover, as the proponents emphasized, legislators constitute 120 of the 132 elected officials affected by the term limits.

There are two kinds of term limits: consecutive term limits and lifetime term limits. Consecutive term limits restrict the number of terms that a representative may serve in a row. Under this approach, which is employed by a majority of the states that have adopted legislative term limits, [FN2] legislators generally may return to office after a reasonable hiatus. While consecutive term limits force successful incumbents to step down from office after some fixed period of service (usually after two or three terms), they allow voters to reelect those same persons at a future time, when they no longer have the advantage of incumbency. Lifetime term limits, on the other hand, are far more restrictive. Once a legislator has served a given number of terms as a senator or assemblyman,

voters are barred for life from ever again electing that person to such office.

FN2. Excluding California, 14 of the 20 states that have term limits employ consecutive term limits. See *Bates v. Jones*, 958 F.Supp. 1446, 1454 n. 5 (N.D.Cal.1997) (collecting state laws).

California proposed and adopted its term limits by means of the state's initiative process. See Cal. Elec.Code § 9000 et seq.; § 13280-82. Because Proposition 140 was a proposed constitutional amendment, the proponents were required to present to the Secretary of State a petition signed by eight *845 percent of the state's registered voters. See id. § 9035. After doing so, the state prepared a "ballot pamphlet," which was sent to all registered voters. See id. § 9094. The ballot pamphlet contained a complete copy of the measure; an official title and summary of the Proposition prepared by the Attorney General; an official analysis prepared by the Legislative Analyst; and "ballot arguments" by the proponents and opponents for and against the measure. See id. §§ 9084-86. [FN3]

FN3. Ballot arguments are arguments written by the proponents and opponents of an initiative, advocating the pros and cons of the measure. See id. §§ 9041-42. They cannot exceed 500 words. Id.

The official title of Proposition 140 as it appeared in the ballot pamphlet read: "Limits of Terms of Office, Legislators' Retirement, Legislative Operating Costs. Initiative Constitutional Amendment." The Proposition itself commenced with the following preamble, which is part of the constitutional amendment:

The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.

The ability of legislators to serve unlimited number of terms [sic], to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding

Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent. To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

Cal. Const., art. IV, § 1.5 (as amended). The Proposition, in relevant part, proposed to amend the California constitutional provision governing legislators by adding the following language:

No Senator may serve more than 2 terms.

... No member of the Assembly may serve more than 3 terms.

Cal. Const., art. IV, § 2(a) (as amended) (emphasis added). Nowhere in the initiative, the title and summary, the Legislative Analyst's statement, or the proponents' ballot arguments, was there any mention of lifetime limits. [FN4]

FN4. By contrast, the state of Oregon's constitutional provision imposing a lifetime ban reads: "No person shall serve more than six years in the Oregon House of Representatives, eight years in the Oregon Senate, and twelve years in the Oregon Legislative Assembly in his or her lifetime." Ore. Const., art. II, § 19, cl. 1 (emphasis added).

On the November 6, 1990 general election, the measure was put to a statewide vote. The following language appeared on the ballot: [FN5]

FN5. The remaining ballot language described the predicted financial impact of the measure, as required by California law. The actual text of the measure appeared nowhere on the ballot.

**TERMS OF OFFICE. LEGISLATURE.
INITIATIVE CONSTITUTIONAL**

AMENDMENT. Limits: terms for specified state elected officials, legislators' retirement, pensions. Legislature's operating costs.... Yes___. No___.

The measure passed by a statewide margin of 52.17% to 47.83%.

In 1991, a group of petitioners consisting of the California Senate and Assembly, a number of individual legislators, and individual constituents challenged the validity of Proposition 140 directly in

the California Supreme Court by way of a petition for writ of mandate. *Legislature v. Eu*, 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309 (1991). Neither Tom Bates nor any of his constituents *846 was a party to the *Eu* action. Because the California Supreme Court chose to exercise its original jurisdiction, no trial was conducted, and no lower court examined the merits of the parties' legal and factual contentions. *Id.* at 500, 286 Cal.Rptr. 283, 816 P.2d 1309.

Petitioners contended that the Proposition was unconstitutional because it imposed lifetime term limits. The state of California [FN6] argued that Proposition 140 did not contain a lifetime ban and that it merely prohibited a "Senator" or "member of the Assembly," rather than a "person," from seeking re-election; the state contended that once an incumbent-legislator has left office "he or she can no longer be described as a 'Senator' or 'member of the Assembly' to which the term limitation provision would apply." *Id.* at 504, 286 Cal.Rptr. 283, 816 P.2d 1309. The state further urged that "a lifetime ban on candidacy is not essential to accomplish the voters' purpose," and that a narrow interpretation of Proposition 140 would "avoid[] conflict with the Constitution" and be "less intrusive of constitutionally protected rights." Applying a highly deferential state-law standard that requires it to adopt "all presumptions [in] favor [of] the validity of initiative measures" and to uphold such measures "unless their unconstitutionality clearly, positively, and unmistakably appears," *id.* at 501, 286 Cal.Rptr. 283, 816 P.2d 1309, the California Supreme Court upheld, against petitioners' state and federal constitutional challenges, the term limits provisions of Proposition 140. Rejecting any need to adopt a narrow construction to avoid unnecessarily deciding difficult constitutional questions, it further concluded that "the measure contemplated a lifetime ban." *Id.* at 505, 286 Cal.Rptr. 283, 816 P.2d 1309.

FN6. For simplicity, we refer throughout this opinion to the respondent in the state court proceeding as the state of California, or "the state." The actual respondent was the Secretary of State, March Fong Eu, whose duty it is to implement the principal provisions of the initiative. The respondent was represented by the state Attorney General, Daniel E. Lungren.

The court first expressed its agreement with one of

(Cite as: 127 F.3d 839, *846)

the arguments advanced by the state and specifically found that "the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban." *Id.* at 504, 286 Cal.Rptr. 283, 816 P.2d 1309 (emphasis added). However, after examining the other official material presented to the voters in the ballot pamphlet, it concluded that Proposition 140's framers and supporters had contemplated such a ban. *Id.* In doing so, it implicitly acknowledged the fact that the drafters and supporters not only failed to mention a lifetime ban in the text of the initiative itself, but also failed to do so in their official ballot arguments, both direct and in rebuttal. Ignoring these compelling circumstances, the state court, after specifically conceding that a ballot measure's opponents are likely to overstate the effects of a measure and that their ballot arguments are not "highly authoritative" as to the measure's actual meaning, resolved the crucial ambiguity in the ballot measure in reliance principally on the ballot arguments advanced by Proposition 140's opponents. [FN7] The California Supreme Court, in terms that can only be described as hesitant, then said that "[w]e think it likely the average voter ... would conclude [that Proposition 140] contemplated a lifetime ban...." *Id.*

FN7. The court also relied secondarily on the fact that, in his analysis, the Legislative Analyst described Proposition 140 as limiting "the number of terms that an elected state official can serve in the same office." *Id.* at 505, 286 Cal.Rptr. 283, 816 P.2d 1309 (emphasis and citation omitted). Although this statement used the term "elected state official" instead of "person" and omitted any mention of a "lifetime" or "permanent" ban, and thus contained the same ambiguity as the Proposition itself, the court deemed it relevant that the Legislative Analyst "made [no suggestion] that only a consecutive term limitation was contemplated." *Id.*

The California Supreme Court, after setting forth its rule that requires all doubts regarding an initiative measure to be resolved in favor of constitutionality, *id.* at 501, 286 Cal.Rptr. 283, 816 P.2d 1309, balanced the state interests in support of lifetime term limits against the burden on the constitutional rights of voters and candidates and ruled in favor of the state. The Supreme Court denied certiorari. *Californians for Citizen Gov't v. Legislature of the State of Cal.*, 503 *847 U.S. 919, 112 S.Ct. 1293, 117 L.Ed.2d 516 (1992) (mem.).

In 1995, plaintiff Tom Bates and a number of his constituents filed suit in district court seeking declaratory and injunctive relief against enforcement of Proposition 140's term limits provisions. Bates represented the 14th Assembly District continuously from his initial election in 1977 until 1996. As a result of Proposition 140, Bates became ineligible to run for re-election in November of 1996, and is forever barred from seeking any other seat in the Assembly as well. Plaintiffs Browning, Buchalter, Graham, Lewis, Lyman, Sherman, and Sterling are voters in Bates' former district. The district court found that they would have voted for Bates in 1996 had he been a candidate. *Bates v. Jones*, 958 F.Supp. 1446, 1456 (N.D.Cal.1997). These voters found Bates to be "an exceptional representative, who served his constituents well and was unusually concerned with and effective at representing the needs of low-income and disabled citizens and protecting the environment." *Id.* In the view of these voter-plaintiffs, other candidates are unlikely to represent them as effectively or as well as Bates.

[2][3][4][5] The state argued that Bates' action is barred by collateral estoppel. In two rulings, one published, *Bates v. Jones*, 904 F.Supp. 1080 (N.D.Cal.1995) ("Bates I"), and one unpublished, the district court stated that Bates and the Eu petitioners shared the same interests but concluded as a matter of state law that neither Bates nor the voter-plaintiffs had been in privity with the Eu petitioners and therefore were not barred from bringing their action. *Id.* at 1088-91. [FN8]

FN8. The district court also granted Bates leave to amend his complaint to add as plaintiffs Assembly members Martha Escutia and Barbara Friedman, as well as voters from their respective districts. The voter-plaintiffs, Hernandez, Navar, Pena, Sculley, and Zarakov, voted for Escutia and Friedman in the past and wish to be able to do so in the future. Neither Escutia nor Friedman was a member of the Assembly, however, at the time of the Eu litigation. Escutia was first elected in 1992, and Friedman joined the Assembly following a special election in mid-1991.

The state argues that the district court abused its discretion in granting the original plaintiffs leave to join these additional plaintiffs. We disagree. Federal Rule of Civil Procedure 15(a) directs a court freely to grant a party leave to amend its complaint "when justice so requires" and "should be applied with 'extreme liberality.'" *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.1987)

(internal citation and quotation marks omitted). Delay alone is insufficient to justify denial of leave to amend; the party opposing amendment must also show that the amendment sought is futile, in bad faith or will cause undue prejudice to the opposing party. *Id.* at 186-87; *Webb*, 655 F.2d at 980. First, based upon the evidence, the district court found that neither Bates nor his fellow plaintiffs had acted in bad faith. This finding is not clearly erroneous. See *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir.1987). Plaintiffs did not attempt to prolong meritless litigation by making repeated and baseless amendments to their complaint; nor is there any evidence of wrongful motive. To the contrary, the district court found that Bates moved to join the additional plaintiffs promptly after discovering his unwitting financial contribution to the *Eu* litigation. The motion to amend was not untimely, repetitious, or for the purpose of keeping meritless claims in court, but to ensure that the claims already presented would be decided on their merits, in furtherance of the very purpose of Rule 15. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Breier v. Northern Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 789 (9th Cir.1963). Second, we reject the state's argument that the district court should have denied the motion to amend because *Escutia* and *Friedman* lacked standing. There can no longer be any question as to whether *Escutia* and *Friedman* have standing. *Escutia* was re-elected to a third term, and the district court properly allowed *Friedman* to remedy the defect in her pleadings by alleging a specific intent to return to the Assembly. Even viewing the question of standing through the eyes of the district court at the time it granted leave to amend, however, *Escutia* and *Friedman* did not lack standing. The district court correctly concluded that *Escutia* and *Friedman* demonstrated an adequate likelihood of future injury for justiciability purposes merely by alleging their desire to run in a particular election for a fourth term in the Assembly. See *Thorsted v. Munro*, 75 F.3d 454, 456 (9th Cir.1996) (holding that congressman's challenges to federal term limits were not rendered moot by his defeat in an intervening election, in light of his desire to seek re-election in the future).

The case proceeded to trial in October of 1996. Together, the parties presented evidence on an array of issues, including the history of term limits in the United States, the actual strength of the interests asserted by the state, the effectiveness of lifetime term limits as a means of furthering those interests, and the availability of less drastic alternatives.

*848 In its final decision, *Bates v. Jones*, 958 F.Supp. 1446 (N.D.Cal.1997), the district court concluded in a careful and thoughtfully reasoned opinion that Proposition 140's lifetime term limits for state legislators were unconstitutional, and granted declaratory and injunctive relief against their enforcement. *Id.* at 1471. The district court applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), for determining the constitutionality of state laws that regulate the election process and burden the rights of voters and candidates.

The district court stayed its injunction pending appeal. The state and intervenors timely appeal the district court's decision on the merits, and plaintiffs timely appeal the stay of injunctive relief pending appeal. [FN9]

FN9. We dispose of the appeal from the stay by separate order.

DISCUSSION

I. Res Judicata

[6] We first consider the state's procedural challenge to plaintiffs' right to pursue this action. The state contends that the res judicata effect of the California Supreme Court's decision in *Legislature v. Eu* bars Bates' claims, if not those of his former constituents as well. We reject the state's argument.

[7][8][9] We apply state law in determining the preclusive effect of a prior state court adjudication, 28 U.S.C. § 1738, and we review questions of res judicata and collateral estoppel de novo. In *re Russell*, 76 F.3d 242, 244 (9th Cir.1996). Under California law, collateral estoppel bars parties from relitigating issues of fact or law that have already been fully and fairly litigated in prior proceedings. *Lumpkin v. Jordan*, 49 Cal.App.4th 1223, 57 Cal.Rptr.2d 303, 307 (1996). A party asserting collateral estoppel must demonstrate that the factual or legal issue is identical to the issue that was previously litigated; that the issue was actually litigated in a prior proceeding and there was a final judgment on the merits; and that the party to be estopped in the current action was in privity with a party in the former proceeding. *Lucido v. Superior Ct.*, 51 Cal.3d 335, 341, 272 Cal.Rptr. 767, 795

P.2d 1223 (1990); Lumpkin, 57 Cal.Rptr.2d at 307. Here, the district court found that the first two requirements had been met, but concluded that the state had failed to demonstrate privity between Bates and the Eu petitioners. We will assume, *arguendo*, that the district court's finding regarding the first two requirements is correct because we agree with its decision as to the third.

[10][11] Although "privity" is not a clearly defined concept under California law, it generally refers to persons who are so identified in interest with the parties to the original action that it is proper to bind them along with the parties to the original litigation. *Dyson v. California State Personnel Bd.*, 213 Cal.App.3d 711, 262 Cal.Rptr. 112, 119 (1989). California courts look to whether the relationship between the party in the earlier suit and the nonparty bringing the current suit is "sufficiently close" to justify preclusion of the latter. *Id.*; *People v. Drinkhouse*, 4 Cal.App.3d 931, 84 Cal.Rptr. 773, 776 (1970). Due process requires at a minimum that the party to be estopped "must have had an identity or community of interest with, and adequate representation by, the losing party in the first action," and "should reasonably have expected to be bound by the prior adjudication." *White Motor Corp. v. Teresinski*, 214 Cal.App.3d 754, 263 Cal.Rptr. 26, 29 (1989).

[12][13] With respect to the first inquiry--whether the nonparty had an identity of interest with, and adequate representation by, the losing party in the first action--due process requires both that the prior litigation of the issue have been motivated by the same underlying purposes, and that the original party have had an incentive and opportunity to litigate the issue in the manner best suited to furthering those common underlying purposes. See, e.g., *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 151 Cal.Rptr. 285, 290, 587 P.2d 1098, 1103 (1978) (finding no privity where issue of "wilfulness" of homicide was litigated first as criminal defense and later to *849 recover defendant's liability insurance). With respect to the second inquiry--whether the nonparty should reasonably have expected to be bound--this notice requirement is satisfied if: (1) the nonparty had received actual notice at the time of the litigation that his interests were being litigated, see *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.*, 120 Cal.App.3d 622, 174

Cal.Rptr. 527 (1981); (2) the nonparty "had in reality contested the prior action even if he did not make a formal appearance," such as where the nonparty had a financial interest in and "power to control" the litigation of the prior action, *Lynch v. Glass*, 44 Cal.App.3d 943, 949, 119 Cal.Rptr. 139 (Cal.App. 1 Dist.1975); or (3) the unsuccessful party in the first action could "fairly be treated as acting in a representative capacity" for the nonparty now being precluded. *Id.*

The district court concluded that of Bates' constituents, plaintiffs Sterling, Sherman, Graham, and Browning had no identity of interest with the Eu petitioners. Sterling and Sherman were not California residents at the time of the Eu litigation, while Graham and Browning were not yet old enough to vote. *Bates I*, 904 F.Supp. at 1090. As to plaintiffs Lyman, Lewis, and Bates himself, it found "no indication" that they were "on notice that their First Amendment rights would be foreclosed" by Eu, given that Eu was not a class action and neither Bates nor any voters from his district participated. *Id.* The district court also concluded that the Eu petitioners had not adequately represented the interests of the plaintiffs in this case. It reasoned that the legislature lacked statutory authority to sue on their behalf and had been "representing its own institutional interests rather than the interests of its members or constituents." *Id.* It also noted that plaintiffs had enjoyed "no control" over the Eu petitioners' unsuccessful litigation strategies, including their "tactical" decisions to bring their action "directly to the California Supreme Court on a petition for mandate, rather than pursuing the more usual course of litigation beginning with fact-based proceedings in a trial court," and to argue for the broadest possible interpretation of Proposition 140--the interpretation that would most drastically limit the constitutional rights of Bates and his constituents. *Id.* Finally, it observed that the plaintiffs in this case had neither requested that the legislature bring the prior action nor participated in it, such as by providing litigation materials or testifying. *Id.* The subsequent discovery that Bates' campaign committee had contributed \$ 1,000 toward the costs of the Eu litigation, albeit without his knowledge, did not alter the district court's privity analysis. The district court reasoned that Bates' contribution of "approximately 0.2%" of the funds that supported the Eu litigation neither gave him "any control of the

litigation" nor caused his interests to coincide with those of the Eu petitioners. *Id.* at 219. It also observed that there would be no "prudential reasons" to apply res judicata against Bates if the complaint were amended to add as plaintiffs Escutia and Friedman, who were not members of the legislature at the time of the Eu litigation and hence would not be subject to the same res judicata arguments.

[14][15] We agree with the district court's holding in general and particularly with its conclusion that the Eu petitioners did not adequately represent the interests of Bates and his former constituents. Whatever their reasons, the Eu petitioners urged the court to construe the initiative in the manner that would most severely limit plaintiffs' fundamental rights. That the present plaintiffs and the Eu petitioners are represented by the same law firm is irrelevant; it cannot be inferred that different clients share the same interests or would choose the same strategies simply because they are represented by the same attorneys. The fact that Bates' campaign committee contributed a minute fraction of the costs of the Eu litigation fails to establish privity. The state does not even dispute the district court's factual findings that the contribution was unwitting, and that no plaintiff in the present case enjoyed control over any aspect of the Eu litigation as a result of the contribution or for any other reason. [FN10]

FN10. Compare, e.g., *Montana v. United States*, 440 U.S. 147, 154, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979) (though not formally a party to prior state court litigation, government was estopped from relitigating in federal court where it required the lawsuit to be filed; reviewed and approved the complaint; paid the attorneys' fees and costs; directed a state court appeal; appeared and submitted an amicus brief in the state supreme court; directed the filing of a notice of appeal to the Supreme Court; and directed the plaintiff to abandon that appeal).

*850 [16][17][18] We hold, in the alternative, that even assuming that Bates and his constituents were in privity with the Eu petitioners, the district court's res judicata ruling is correct. Under California law, even when the formal prerequisites for collateral estoppel are present, the public interest may require that relitigation of certain questions of law not be foreclosed. It is the "established rule" in California that a "prior legal determination is not conclusive ... if the public interest requires that relitigation not be

foreclosed." *Kopp v. Fair Political Practices Comm'n*, 11 Cal.4th 607, 47 Cal.Rptr.2d 108, 116 n. 16, 905 P.2d 1248, 1257 n. 16 (1995) (emphasis in original). The initial determination of an issue need not be erroneous to warrant reexamination under the "public interest" exception to res judicata. *Id.* Instead, reexamination of a previously decided legal question is appropriate where the potential adverse impact on the public or persons who were not parties to the previous action "demonstrates a convincing need for a new determination of the issue." *Rutherford v. State*, 188 Cal.App.3d 1267, 233 Cal.Rptr. 781, 789 (1987) (applying the public interest exception to reexamine the constitutionality of a state environmental statute and the manner of its enforcement); *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal.4th 251, 5 Cal.Rptr.2d 545, 547-49, 825 P.2d 438, 440-42 (1992) (applying the public interest exception to permit reexamination of the constitutionality of a statute affecting "the public in general"); *City of Sacramento v. State*, 50 Cal.3d 51, 266 Cal.Rptr. 139, 145-46, 785 P.2d 522, 528-29 (1990) (applying the public interest exception where large numbers of citizens might otherwise be adversely affected by unjust tax impositions); *California Optometric Ass'n v. Lackner*, 60 Cal.App.3d 500, 131 Cal.Rptr. 744, 747 (1976) (invoking the public interest exception to review an administrative agency's violation of its ongoing obligation to administer statutes enacted for the public benefit).

This case is highly appropriate for application of the public interest exception. As we explain below, Proposition 140 imposes a severe burden on fundamental constitutional rights of voting and association that are "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964). Moreover, the most serious effects of Proposition 140 are suffered by voters, who, with only a few exceptions, did not participate in, or even have notice of, the action in Eu. Finally, since the California Supreme Court's decision, the Supreme Court has decided two cases clarifying issues about which the California Supreme Court expressed uncertainty and indicating that the state's lifetime ban must be more carefully scrutinized as a matter of federal law than some, including the California Supreme Court, had previously believed necessary. [FN11] *Cf. Minnis v. United States Dep't of Agriculture*, 737 F.2d 784, 786 n. 1 (9th Cir.1984)

(noting that presence of intervening Supreme Court decisions that clarify issue defeats collateral estoppel claim), cert. denied, 471 U.S. 1053, 105 S.Ct. 2112, 85 L.Ed.2d 477 (1985).

FN11. See discussion of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), *infra* at —.

We conclude that application of the public interest exception is warranted by the overwhelming public importance of the issues involved; the numbers of persons whose fundamental rights were severely limited as a result of a writ proceeding that was conducted primarily between governmental entities and that bypassed the ordinary judicial procedures; and the existence of intervening, clarifying authority. In concluding that the public interest exception permits a federal court to reexamine federal questions previously decided in state court, we do not, of *851 course, fashion a new doctrine in tension with principles of comity and federalism. Rather, we apply the law of California as fashioned by the California Supreme Court. [FN12]

FN12. The state also contends that the voter-plaintiffs from Bates' former district lack standing because they have alleged no injury that would be redressed by a decision invalidating the term limit provisions of Proposition 140. It suggests that because Bates is barred from running not by Proposition 140, but by the *res judicata* effect of *Eu*, a judicial ruling in favor of the voter-plaintiffs would not redress their injury. The argument is utterly without merit. Bates is not in fact barred by *res judicata*, and even if he were, it cannot be questioned that invalidation of Proposition 140's term limit provisions would enable him to run again and thereby redress the injury alleged by the voter-plaintiffs. It is Proposition 140, not the California Supreme Court's interpretation and application of Proposition 140 in *Eu*, that prevents Bates from seeking re-election.

II. Proposition 140 and the Burden it Imposes

[19] Proposition 140 presents a novel and difficult question of constitutional law. Neither the Supreme Court, [FN13] nor any circuit court, [FN14] has ever considered the constitutionality *852 of lifetime term limits for state legislators or, indeed, any state officials. A lifetime ban is, for two primary

reasons, different in kind from all other state laws affecting the election process that the Supreme Court and circuit courts have previously considered in a First Amendment context.

FN13. The state contends that the constitutionality of Proposition 140 is controlled by *Moore v. McCartney*, 425 U.S. 946, 96 S.Ct. 1689, 48 L.Ed.2d 190 (1976) (mem.), in which the Supreme Court summarily dismissed an appeal from State ex rel. *Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607 (1976), rejecting an incumbent-governor's federal constitutional challenge to lifetime term limits for state executive officials for want of a substantial federal question. A summary dismissal by the Supreme Court for want of a substantial federal question is a decision on the merits, but is controlling only on "the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); see also *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 989-90, 59 L.Ed.2d 230 (1979); *Mandel*, 432 U.S. at 180, 97 S.Ct. at 2242-43 (Brennan, J., concurring). As a threshold matter, even if we were to assume that *Moore* concerned precisely the same issues involved here, extensive intervening doctrinal developments—including *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569-70, 75 L.Ed.2d 547 (1983), and *U.S. Term Limits v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995)—strongly suggest that continued reliance on *Moore* is unwarranted. See *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975) (reliance on the fact that the Supreme Court has branded a particular question unsubstantial ceases to be appropriate "when doctrinal developments indicate otherwise"). More important, it is unclear whether the Supreme Court had jurisdiction in *Moore* to consider the rights of voters, as opposed to those of candidates. No voters were parties either to the state court action or to the subsequent federal appeal. *Maloney*, 223 S.E.2d at 610-13. There is also, of course, the question whether executive and legislative term limits present the identical issue. Finally, *Moore* is not controlling here because the plaintiff in *Moore*, unlike plaintiffs in the present case, did not raise any First Amendment challenge to term limits. The West Virginia Supreme Court considered only the argument that lifetime term limits for state executive officials violate equal protection. *Maloney*, 223 S.E.2d at 610-13.

FN14. The only circuit court decision that even considers the general subject of state term limits,

League of Women Voters v. Diamond, 82 F.3d 546 (1st Cir.1996), involves the constitutionality of consecutive term limits, and does not address the merits of the issue owing to the procedural posture of the case on appeal. The district court had denied relief on the ground that the statute was "likely" to survive constitutional scrutiny, but had done so expressly "[w]ithout determining th[e] issue finally on its merits." *League of Women Voters v. Diamond*, 923 F.Supp. 266, 272 (D.Me.1996). In a one-page, per curiam opinion, the First Circuit affirmed "substantially for the reasons recited by the district court," agreeing both that the plaintiffs had "established something less than a probability of success on the merits" and that the equities favored denial of preliminary injunctive relief as well. *Diamond*, 82 F.3d at 547.

The state and the Schabarum intervenors nevertheless cite a number of state and federal district court decisions for the proposition that the constitutionality of term limits for state officials is well established. The decisions establish no such proposition. Some of these decisions concerned executive or judicial officials, rather than legislators, while others addressed only the constitutionality of consecutive term limits. See *Dutmer v. City of San Antonio*, 937 F.Supp. 587, 591-95 (W.D.Tex.1996) (upholding lifetime term limits for city officials); *Nevada Judges Ass'n v. Lau*, 112 Nev. 51, 910 P.2d 898, 901-03 (1996) (upholding lifetime term limits for judges); *Roth v. Cuevas*, 158 Misc.2d 238, 603 N.Y.S.2d 962 (Sup.Ct.1993) (upholding consecutive term limits for city officials), *aff'd*, 197 A.D.2d 369, 603 N.Y.S.2d 736 (App.Div.), *aff'd*, 82 N.Y.2d 791, 604 N.Y.S.2d 551, 624 N.E.2d 689 (1993); *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607, 611-13 (1976) (upholding lifetime gubernatorial term limits), discussed *infra*. In fact, only one state supreme court decision has upheld lifetime term limits for legislators. See *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349, 359-60 (1994) (upholding lifetime term limits for legislative and executive officials), *aff'd* in other respects *sub nom.* *U.S. Term Limits v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). Most recently, the Supreme Judicial Court of Massachusetts struck down a law imposing consecutive term limits on state executive and legislative officials, but did so on state law grounds. *League of Women Voters v. Secretary of the Commonwealth*, 425 Mass. 424, 681 N.E.2d 842 (1997).

First, Proposition 140 affects a change in the state's governmental structure that is far more basic than any provision dealt with in prior cases examining state election laws for First Amendment violations.

The state interest underpinning lifetime term limits is not merely the customary one of regulating elections, but, rather, it lies in the state's power to determine the fundamental nature of its legislature. [FN15] Here, it does this by attempting to ensure that future lawmakers will all be "citizen-legislators." In contrast, as the Court said recently in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995), the state election laws at issue in prior cases (other than equal protection cases), related to the states' adoption of "election procedures," and were designed to ensure that elections would be conducted in an "orderly, fair, and honest" manner. *Id.* at 834-35, 115 S.Ct. at 1869-70. [FN16]

FN15. The Supreme Court has dealt with cases involving similar state interests in the equal protection context. The state's interest in designing its own legislative structure was essentially the interest involved in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) and *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964). In *Lucas*, the Court invalidated an initiative passed by the citizens of Colorado which apportioned the House of Representatives on the basis of population, but apportioned the Senate according to population and other factors, including geographical, historical, topographic, and economic considerations. 377 U.S. at 738, 84 S.Ct. at 1474-75. *Reynolds* involved the same basic issue, except the state law there was a decades-old act passed by the state legislature. In deciding the cases, the Court gave little deference to the states' interest in defining its political institutions as it saw fit, concluding that the full and unfettered right to vote in state elections is of the upmost importance. It then invalidated the state laws under the Equal Protection Clause on the ground that one person's vote could not count more than another's.

FN16. The Court cited as examples of such regulatory laws *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (upholding Hawaii statute requiring state legislative candidates to comply with state procedures in order to qualify for ballot and prohibiting write-in voting); *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (invalidating Ohio's early filing deadline for independent candidates for President); and *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (upholding California's timing and signature requirements for appearing on ballot).

Second, the severity of the burden that Proposition 140 imposes on the people's right to vote for the candidates of their choice far exceeds any limitation imposed by laws that simply regulate the state electoral process. [FN17] In the past, the burdens imposed by state election laws have required candidates for office to comply only with "procedural hurdles" in order to earn a place on the ballot. Thus, as the Court explained in *U.S. Term *853 Limits*, none of its decisions upholding state laws as legitimate exercises of the power to regulate elections addressed a law that limited voting rights by "exclud[ing] candidates from the ballot without reference to the candidates' support in the electoral process." *Id.* at 835, 115 S.Ct. at 1870. [FN18] None severely limited the voters' right to vote for the candidate of their choice.

FN17. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) dealt expressly with the people's constitutional right to vote for whomever they wish and analyzed the burden that lifetime term limits imposes on that right. The Court made it clear that it believed the burden to be severe. However, because the term limits in that case applied to federal, as opposed to state, legislators, the Court ultimately based its holding principally on the Qualifications Clause of the U.S. Constitution. See 514 U.S. at 787-826, 115 S.Ct. at 1847-66.

Justice Kennedy, who joined the Court's opinion in *U.S. Term Limits*, wrote a separate concurrence explaining the differences between the majority and dissenting opinions regarding the Qualifications Clause. He did not, however, express any disagreement with the Court's view that lifetime term limits impose a severe limitation on the exercise of fundamental rights, nor did he disavow the historical analysis of that question that runs throughout the Court's opinion. Whatever one's view of the outcome of any balancing test that may be used to determine whether the state's interest outweighs the burden inherent in limiting voters' rights, there should be little doubt that precluding all of the voters of the state from again voting for the candidates they have chosen to be their choice as their representatives severely limits their right to vote for whom they choose.

FN18. The cases that the Court distinguished include all but one of the cases on which the state principally relies. While the Court did not mention *Gregory* in its decision, the reasons are obvious. First, the plaintiffs in *Gregory* did not assert any voting rights claim. Rather, the plaintiff-judges alleged only an equal protection violation, and no

voter was a party to the proceeding. Moreover, there are three key differences between Missouri's law in *Gregory* and the type of law to which the Court was referring. First, the judges did not run against other candidates in the elections; at the end of a fixed term, rather, a question appeared on the ballot as to whether they should be returned to office. See *Gregory*, 501 U.S. at 472, 111 S.Ct. at 2407 (citing Mo. Const., art. V, § 25(a)). Second, Missouri's age-restriction, like minimum age restrictions, operated to exclude candidates for a very limited time period (the period of life expectancy after the age of 70). Third, electing judges invokes significantly different considerations than that of electing legislators. Legislators are supposed to draw public support by representing the popular will and passing laws in the people's interest; thus, under the democratic process, legislative elections, unlike unopposed judicial elections, are a crucial method of ensuring that public officials implement the people's desired state policies. See *id.*; cf. *Reynolds*, 377 U.S. at 562, 84 S.Ct. at 1381-82 (highlighting the paramount importance to our democracy of state legislatures). *Gregory* differs from the case before us in these same respects.

[20][21][22] We do not in any way minimize the state's interest in adopting measures like Proposition 140. It cannot be doubted that the state has a particularly strong interest in its right to determine the structure of its political institutions. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991); see also *Dunn v. Blumstein*, 405 U.S. 330, 344, 92 S.Ct. 995, 1004, 31 L.Ed.2d 274 (1972) (stating that a state enjoys inherent authority to define itself by "preserv[ing] the basic conception of a political community"); *Sugarman v. Douglass*, 413 U.S. 634, 648, 93 S.Ct. 2842, 2850-51, 37 L.Ed.2d 853 (1973). Indeed, the manner in which a state designs its own political structure and sets qualifications for its officials "lie[] at the heart of representative government." *Gregory*, 501 U.S. at 463, 111 S.Ct. at 2402 (internal quotation marks and citation omitted). [FN19]

FN19. States, however, are not free to create their legislative structures in violation of constitutional restraints. See *Reynolds*, 377 U.S. at 566, 84 S.Ct. at 1383-84; accord *Lucas*, 377 U.S. at 736, 84 S.Ct. at 1473-74. As the Court very recently emphasized, "[s]tates ... enjoy wide latitude to establish conditions of candidacy for state office, but

in setting such conditions, they may not disregard basic constitutional protections." *Chandler v. Miller*, — U.S. —, —, 117 S.Ct. 1295, 1302, 137 L.Ed.2d 513 (1997) (citing *Gregory*, 501 U.S. at 463, 111 S.Ct. at 2402).

Nor, contrary to the state's suggestion—which the dissent apparently adopts at least to some degree—may states insulate from judicial review their decisions regarding their political structures by claiming that they present nonjusticiable "political questions." The Supreme Court has, for decades, soundly rejected this argument. See, e.g., *Baker v. Carr*, 369 U.S. 186, 209-37, 82 S.Ct. 691, 705-21, 7 L.Ed.2d 663 (1962). It is abundantly clear since that historic decision that constitutional claims are not rendered nonjusticiable merely "because they touch matters of state governmental organization." *Id.* at 229, 82 S.Ct. at 716-17. *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508, upon which the dissent relies, merely states the obvious under that rule: that courts should not disturb "the manner in which a State has decided to govern itself" if that manner does not violate the First or Fourteenth Amendment. *Id.* at 972, 102 S.Ct. at 2848.

On the other hand, the Supreme Court has left no doubt that the burden created by the state's lifetime ban is exceptionally severe. While we have no need in this opinion to balance the state's interest in adopting lifetime term limits against the burden they impose on fundamental voting rights, determining the extent of this burden is important to our analysis.

[23][24] The Supreme Court has emphatically stated that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555, 84 S.Ct. at 1378. Because "[s]tate legislatures *854 are, historically, the fountainhead of representative government in this country," this right applies with equal force "in state as well as federal elections." *Id.* at 554, 564, 84 S.Ct. at 1377-78, 1382-83. "Other rights," the Supreme Court has explained, "even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 534-35, 11 L.Ed.2d 481 (1964)). Hence, Proposition 140's lifetime ban on the people's right to vote for legislators of their choice does not simply handicap the rights of individuals; it violates a "fundamental principle of our representative democracy" that "the

people should choose whom they please to govern them." *U.S. Term Limits*, 514 U.S. at 795, 115 S.Ct. at 1851 (quoting *Powell v. McCormack*, 395 U.S. 486, 547, 89 S.Ct. 1944, 1977-78, 23 L.Ed.2d 491 (1969) (quoting 2 *Debates on the Adoption of the Federal Constitution* 257 (J. Elliott ed. 1863) (Alexander Hamilton, New York))) (internal quotation marks omitted).

As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.... "The people are the best judges who ought to represent them. To dictate and control them, to tell them who they shall not elect, is to abridge their natural rights."

Powell, 395 U.S. at 547, 89 S.Ct. at 1977; *id.* at 541 n. 76, 89 S.Ct. at 1974 n. 76 (quoting 2 *Elliot's Debates* 292-93). In *Powell*, the Supreme Court "agreed with the sentiment expressed on behalf of *Wilkes*' admission to Parliament: 'That the right of electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution.' " *U.S. Term Limits*, 514 U.S. at 795, 115 S.Ct. at 1851 (quoting *Powell*, 395 U.S. at 534 n. 65, 89 S.Ct. at 1971 n. 65 (quoting 16 *Parl. Hist. Eng.* 589-90 (1769))).

Lifetime term limits impose a penalty on the voters that is both severe and paradoxical. Unlike consecutive term limits, which are designed to obviate any unfair advantages incumbents may have, lifetime term limits do not simply provide a hiatus from office, but, rather, impose a permanent ban. The effect of lifetime term limits, as Justice Kennedy explained in his concurring opinion in *U.S. Term Limits*, is "that [a state] can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised [those rights]. If a majority of the voters ... successful[ly] select[s] a candidate, they [are] penalized from exercising that same right in the future." 514 U.S. at 844, 115 S.Ct. at 1874 (Kennedy, J., concurring). The logic of this statement is, of course, equally applicable to state elections; the penalty imposed on the voters is identical.

Despite the strength of the Supreme Court's statements, the state contends that term limits do not impose a severe burden on individual rights, in part

because they neither "discriminate" against a particular political group or viewpoint nor constitute a "content-based restriction." In addition, the state emphasizes that voters may still vote for candidates with "similar views and ability" to those incumbents barred by term limits and that individuals barred from the legislature by term limits remain eligible to hold state executive office, elective or appointed, or to seek federal office. The burden Proposition 140 imposes on the rights of voters and candidates is truly severe for the reasons already explained. We need not consider whether, in addition, the measure can be described as "discriminatory" or "content-based." That there may be other candidates whose views the voters may find palatable, and that "termed out" candidates are free to seek non-legislative offices simply does not address the constitutional injury inflicted: the Proposition permanently deprives the voters of the right to vote for the person they wish to represent them in the state legislature. [FN20]

FN20. Contrary to the suggestion of the Schabarum intervenors, the ability of states to disenfranchise convicted felons does not demonstrate that permanent restrictions on the franchise are reasonable. The Court has held that the permanent disenfranchisement of convicted felons does not violate equal protection for the specific reason that it has "an affirmative sanction in § 2 of the Fourteenth Amendment" demonstrated by both the text and history of that provision. *Richardson v. Ramirez*, 418 U.S. 24, 54, 94 S.Ct. 2655, 2671, 41 L.Ed.2d 551 (1974). The Schabarum intervenors do not suggest, and we see no basis for concluding, that term limits enjoy similar support in the text and history of the Constitution.

*855 The state offers two additional arguments in mitigation of the burden imposed by lifetime term limits--namely, that the burden is lessened by the possibility of future repeal, and that term limits reduce existing burdens on voting rights. These arguments are without merit. First, the ability of a majority of voters to repeal term limits in no way mitigates the burden that the measure imposes while it is in effect. Were laws to be held not to limit fundamental rights because they can be repealed, the Constitution would become a meaningless document. Every law, no matter how violative of individual rights, would pass the state's test. That the law was passed by initiative makes it even harder to rid society of the measure because of the extreme financial costs involved in putting initiatives on the

ballot. See *infra* note 29. Second, the state's argument that term limits reduce existing burdens on voting rights by enlarging the field of eligible candidates is pure speculation. More important, the assertion that Proposition 140 constitutes an effort to enhance a fundamental right by infringing on it is a woefully misguided argument that the Court has emphatically rejected in the past. See *Buckley v. Valeo*, 424 U.S. 1, 48-50, 96 S.Ct. 612, 649, 46 L.Ed.2d 659 (1976) (*per curiam*) (stressing that "the concept that government may restrict the speech of some ... to enhance the relative voice of others is wholly foreign to the First Amendment").

III. Proposition 140's Enactment and Its Lack of Notice

In this case of first impression, we are faced with directly conflicting rights and interests of the upmost importance. The state has attempted to resolve this historic conflict by means of a direct ballot initiative that would severely limit the right of the people to elect whomever they choose. Whether or not a state may lawfully adopt lifetime legislative term limits as a general matter, the techniques it employed here raise a serious issue of constitutional dimension: whether the voters are entitled to adequate notice that the measure, if enacted, would severely limit their fundamental rights. Proposition 140 on its face contained no reference to lifetime limits, and the ballot arguments submitted by the initiative's proponents failed to mention that the measure contemplated such a ban; so, too, the materials prepared by the state were wholly silent on the point. The initiative barely passed with an affirmative vote of 52%; a switch of approximately 2% of the votes would have resulted in its defeat.

We are faced, in short, with two constitutional issues in this case: one procedural, one substantive. Given the magnitude of the substantive constitutional question presented by lifetime legislative term limits and the narrowness of the procedural question regarding the need for fair notice in this type of initiative measure, it seems prudent--as well as logical--to decide the procedural question first. Such an approach is consistent with Justice Powell's admonition in *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 452, 94 S.Ct. 656, 663, 38 L.Ed.2d 635 (1974), that "the appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief."

Id. at 452, 94 S.Ct. at 663 (Powell, J., concurring) (opting, joined by three other Justices, to rest concurring vote on narrow equal protection ground instead of broad First Amendment freedom-of-speech ground); see also *Thompson v. Oklahoma*, 487 U.S. 815, 858, 108 S.Ct. 2687, 2711, 101 L.Ed.2d 702 (1988) (O'Connor, J. concurring) (reiterating long-standing doctrine that federal courts "avoid unnecessary, or unnecessarily broad, constitutional adjudication"); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 297, 102 S.Ct. 1070, 1078-79, 71 L.Ed.2d 152 (1982) (White, J., concurring in part and dissenting in part) (espousing adherence to principle that, when presented with two separate constitutional questions, Court decide narrow constitutional question). That approach, as Justice O'Connor stated, finds its genesis in Justice Brandeis' concurrence *856 in *Ashwander v. TVA*, 297 U.S. 288, 341-56, 56 S.Ct. 466, 480-87, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Its basic teaching, which we follow today, is the need to abstain from deciding fundamental constitutional questions prematurely, and perhaps unnecessarily.

A careful analysis of Proposition 140 and the California Supreme Court decision construing it reveals that the Proposition and the relevant ballot materials failed adequately to advise the voters of its principal and most drastic effect. The people were required to vote on an initiative measure without adequate notice of the severity of the burden it imposed on their fundamental voting rights—a measure that did not clearly inform them that they were being asked to adopt a lifetime ban on future legislative service by the persons they choose to be their representatives. Moreover, it is likely that the number of voters who were not aware of the initiative's principal effect was sufficiently large that it could have affected the outcome of the election. We conclude that under these circumstances, even if a majority of the voters of the state of California may, under other circumstances, lawfully decide to adopt lifetime legislative term limits, the passage of Proposition 140 did not constitutionally achieve that objective.

[25] The California Supreme Court expressly determined that "the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban." *Legislature of the State of California v. Eu*, 54 Cal.3d 492, 286 Cal.Rptr. 283, 289, 816 P.2d 1309, 1315 (1991), cert. denied sub nom. *Californians for*

Citizen Gov't v. Legislature of the State of Cal., 503 U.S. 919, 112 S.Ct. 1293, 117 L.Ed.2d 516 (1992). In this respect, it accepted the argument advanced by the Attorney General of California on behalf of the Secretary of State. We agree and consider the California court's conclusion authoritative. See, e.g., *Johnson v. Fankell*, — U.S. —, —, 117 S.Ct. 1800, 1804, 138 L.Ed.2d 108 (1997) (state supreme court constructions of state laws are binding on federal courts); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1494 n. 4 (9th Cir.1996) (requiring deference to state supreme court constructions of state laws). The preamble of Proposition 140 focuses almost exclusively on curbing unfair "incumbent" advantages, an objective that underlies the imposition of both consecutive and lifetime term limits. The Proposition goes on to state that "[n]o Senator" and "[n]o member of the Assembly" may serve more than two or three terms respectively. Cal. Const., art. IV, § 2, subd. (a). [FN21] The state Attorney General contended that this language applies only to senators and members of the assembly and not to former officeholders. Read in this manner, the measure would impose consecutive term limits, not a lifetime ban. The phrase "lifetime limits," which the state uses so forcefully now, appears nowhere in the text of the amendment, the proponents' ballot arguments, or the official statements prepared by the state. As the California Supreme Court recognized, therefore, the Proposition could easily be read as applying only to incumbent office holders. *Eu*, 286 Cal.Rptr. at 288-89, 816 P.2d at 1314-15. Nonetheless, the court, after conceding that opponents tend to overstate the effects of measures in their ballot arguments, relied primarily on the opponents' ballot arguments in reaching the equivocal conclusion that, despite the initiative's facial ambiguity, "We think it likely [that] the average voter ... would conclude the measure contemplated a lifetime ban." *Eu*, 286 Cal.Rptr. at 290, 816 P.2d at 1316 (emphasis added). As we read the court's opinion, that is by no means a finding (or a conclusion) that all of the voters who voted in favor of the measure so understood it, or even that a sufficient number of those voting "yes" to constitute a majority did so. Given the 52% affirmative vote, the court's statement falls far short of supporting any such inference. In fact, it appears *857 to us to acknowledge implicitly that a number of voters who do not fall within the classification "average"

[FN22] are likely to have suffered the inevitable consequence of a lack of adequate notice--i.e., that a fair number may (because of the lack of such notice) have failed to understand that a lifetime ban was contemplated. [FN23]

FN21. This language stands in contrast not only to other states' lifetime bans, see *supra* note 4, but also to the lifetime-presidential-term-limits provision of the U.S. Constitution. See U.S. Const., amend. XXII ("No person shall be elected to the office of the President more than twice") (emphasis added). Proposition 140's drafters, therefore, easily could have presented to the voters an unambiguous lifetime-ban provision by simply tracking the language of the U.S. Constitution.

FN22. California is no Lake Wobegon where all people are "above average," see Garrison Keillor, *Lake Wobegon Days* (1985); nor, obviously, are 96% of the voters who cast ballots on the measure, pro or con, "average," or above. (Ninety-six percent of the "yes" voters is the number of voters necessary to constitute a majority of those voting.)

FN23. We emphasize that the closeness of the vote is not necessary to our decision. Nevertheless, we note that the state now contends that "[n]o voter could have missed the point." Supp. Br. at 2. In doing so, the state flatly contradicts its statements to the state supreme court regarding the measure's ambiguity. Ambiguity, in itself, shows that some voters, at least, are likely to have "missed the point."

[26][27] Although the proper interpretation of Proposition 140 is purely a matter of state law, the issue whether the people's fundamental political rights may be severely burdened by means of an "ambiguous" initiative that "the average voter" would only "likely" understand is, contrary to the state's assertion in its supplemental brief, a question of federal law. Under the California rule for construing initiatives, which requires courts to indulge "all presumptions [in] favor [of] the validity of initiative measures," *id.* at 501, 286 Cal.Rptr. 283, 816 P.2d 1309, it is enough for purposes of interpreting the meaning of the measure that the "average" voter "likely" understood the measure. But the federal standard for adequate notice when fundamental rights are at stake requires a different and more stringent inquiry. Thus, while we accept the California Supreme Court's determination that the measure contains a lifetime ban, how and in

what manner a state may limit rights guaranteed by the Constitution is a quintessential federal law issue. Here, that issue directly implicates due process concerns.

[28] It is well established that when a restriction "severely" limits fundamental voting rights, courts must assess the state's interests in doing so with great care. See *Burdick*, 504 U.S. at 434, 112 S.Ct. at 2063-64; *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705-06, 116 L.Ed.2d 711 (1992); *Reynolds*, 377 U.S. at 562, 84 S.Ct. at 1381-82. Our exercise, although derived from the principles of *Burdick*, is one step removed. Before even imposing such burdens on fundamental rights, we must be assured that the process permits the imposition.

We believe that *Burdick*, along with the Supreme Court doctrine discussed below, requires that we carefully scrutinize the process by which initiatives, such as Proposition 140--initiatives that have the effect of severely limiting fundamental voting rights--are enacted. We must do so in order to ensure that sufficient notice has been given that fundamental rights will be so burdened. Simply put, we believe that the careful scrutiny required by *Burdick* must apply to the process as well as the effect of such laws. Indeed, the Supreme Court has, on a number of occasions, refused to permit the imposition of severe limitations on fundamental rights in the absence of adequate notice and a carefully considered decision to do so. Years ago, for instance, the Court explained that decisions to restrain "long-accepted notions of fair procedures ... must be made explicitly not only to assure that individuals are not deprived of cherished rights and procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting ... our laws." *Greene v. McElroy*, 360 U.S. 474, 507, 79 S.Ct. 1400, 1419, 3 L.Ed.2d 1377 (1959) (internal citations omitted); see also *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971) ("In traditionally sensitive areas ... the requirement of clear statement assures that the [enacting body] has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

While this principle has most often been employed

in order to construe narrowly statutes *858 of questionable constitutionality, [FN24] the Court has, on occasion, invoked it to strike down laws when a narrow construction was unavailable. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), for example, federal regulations deprived aliens of the right to work in federal service positions. In support of the regulations, the federal government asserted an "overriding" national interest for its discriminatory rule. Recognizing that if it accepted the government's interest it could not reasonably apply any balancing test, the Court struck down the regulations because nothing demonstrated that the parties responsible for enacting the regulations had given the matter "a considered evaluation." 426 U.S. at 115, 96 S.Ct. at 1911. Even assuming that the government's overriding interest "would adequately support an explicit determination by Congress or the President to exclude all noncitizens from public service," the Court held that due process required more thorough and definitive action by the entities responsible for enacting the drastic regulation. 426 U.S. at 116, 96 S.Ct. at 1911-12. [FN25]

FN24. See, e.g., *Kent v. Dulles*, 357 U.S. 116, 129-30, 78 S.Ct. 1113, 1119-21, 2 L.Ed.2d 1204 (1958) (declining, because no clear statement was present, to read statute delegating authority to the Secretary of State as granting the authority to limit people's fundamental right to travel and, therefore, invalidating State Department directive limiting citizens' passport rights).

FN25. Specifically, the Court stated: "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." 426 U.S. at 103, 96 S.Ct. at 1905. The majority invalidated the regulations despite the dissent's reminder that "the power of the federal courts is severely limited in the areas of immigration and regulation of aliens." *Id.* at 117, 96 S.Ct. at 1912 (Rehnquist, J., dissenting) (gathering cases). The power of the federal courts, on the other hand, is perhaps at its zenith in the areas of the First and Fourteenth Amendments and voting rights. We therefore believe that the procedural due process requirements identified in *Hampton* apply with particular force to initiatives like Proposition 140.

The Court's *Hampton* decision was very much like

two decisions in which the Court had applied due process to direct democracy in the context of restraints on the use of land. See *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912). In both cases, the court struck down as violative of due process local ordinances that allowed zoning decisions to be made simply by a two-thirds popular vote of the residents in the area. In both cases, the Court concluded that the authority of the property owners "uncontrolled by any standard or rule prescribed by the legislative action," with no provision for review, violated the people's due process right to a considered decision by an independent body. *Roberge*, 278 U.S. at 121-22, 49 S.Ct. at 51-52; accord *Eubank*, 226 U.S. at 144, 33 S.Ct. at 77.

Perhaps the case that is most comparable to the one before us is *Thompson v. Oklahoma*, 487 U.S. 815, 857, 108 S.Ct. 2687, 2710-11, 101 L.Ed.2d 702 (1988). In that case, the Supreme Court faced the question whether states could constitutionally impose the death penalty on children younger than 16. Because Oklahoma law, like the law of 19 other states, sometimes channeled 15-year-olds into the adult criminal justice system, it allowed Thompson to be executed. An Oklahoma jury sentenced Thompson to death, and Oklahoma's Court of Criminal Appeals affirmed both the constitutionality of its law and the sentence. 487 U.S. at 820, 108 S.Ct. at 2690-91. Presented with such a powerful interpretation of state law, the plurality and the dissent attempted to discern whether states like Oklahoma actually intended their laws to apply this way and disagreed sharply over whether there was a national consensus forbidding such executions. Justice O'Connor, however, concluded that it was unnecessary to take a position on the issue that divided the Court because of the basic flaw inherent in the Oklahoma law. While not expressly mentioning due process, she nonetheless cast the deciding vote to hold the law unenforceable because "there [was] a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility." *Id.* at 857, 108 S.Ct. at 2711 (O'Connor, J., concurring). Because those voting for the law severely burdened the fundamental *859 constitutional right to be free

from cruel and unusual punishment "without the earmarks of careful consideration that [the Court] has required for other decisions" in this fundamental, constitutional area, Justice O'Connor cast the deciding vote not to enforce the Oklahoma law. Id. [FN26]

FN26. It is unclear from the Court's decision whether it struck down Oklahoma's law or whether it somehow merely held it inapplicable. Obviously, however, the result was the same: the Court held that the state could not enforce its law.

Justice O'Connor repeatedly emphasized that Thompson was a death penalty case, and that death penalty cases are "different." She also stressed that Thompson was an "unusual," even "unique," case. Id. at 858, 108 S.Ct. at 2711 (O'Connor, J., concurring). [FN27] The case before us, however, is equally unusual and, in many ways, as compelling. First, as we have previously emphasized, the right at issue here is also fundamental. The passage of the measure directly affects every voter in California in the most fundamental way; in our representative democracy, the right to elect whomever one chooses is the most central of all rights. See Reynolds, 377 U.S. at 562, 84 S.Ct. at 1381-82 (explaining that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights"); supra at 853-54. Second, the absence of due process is even more apparent in the California initiative because it was explicitly found "ambiguous" on its face, not just possibly unintended. The measure is not one that might have required the voters simply to predict certain potential applications or fill in gaps in the initiative; they had to guess as to the very meaning and effect of the measure's principal provision. The ambiguity lies at the heart of the language of the measure, at the heart of the provision that implements its principal objective--a provision that has since been construed as imposing a lifetime ban, a severe limitation on the people's most fundamental right.

FN27. Although the holding was "unusual," it certainly did not lack precedent. For another such holding, see *Califano v. Goldfarb*, 430 U.S. 199, 223 n. 9, 97 S.Ct. 1021, 1035 n. 9, 51 L.Ed.2d 270 (1977) (Stevens, J., concurring) (casting deciding vote to hold that Social Security Act provision violated equal protection right because there was no clear evidence of a "considered legislative choice,"

but stating that "[p]erhaps an actual, considered legislative choice would be sufficient to allow this statute to be upheld, but that is a question I would reserve until such a choice has been made").

Cases involving the adoption of state laws or constitutional amendments by means of the initiative process raise concerns that are not present when ordinary legislative lawmaking is involved. Though the initiative process was virtually unknown to the Framers, the Federalist papers--and, to a lesser extent, the Constitution--reflect a wariness of the products of simple majoritarianism. In Federalist No. 10, Madison stated that majority factions ought to be contained because they are apt to be willing to sacrifice the "public good and the rights of citizens" to their "ruling passion or interest." Federalist No. 10, at 60-61 (James Madison) (J. Cooke ed.1961). He was even more direct in Federalist No. 51: "If the majority be united by a common interest, the rights of the minority will be insecure." Id. No. 51, at 351 (James Madison). Of particular relevance to the case at hand, Madison continued, "There are particular moments in public affairs when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful representations of interested men, may call for measures which they themselves will afterwards be the most ready to lament." Id. No. 63, at 425 (James Madison) (emphasis added). It is government's duty under our constitutional design, therefore, to "safeguard against the tyranny of [such] passions." Id. We agree with Hamilton that the need for judicial independence is the greatest when constitutional impairments are "instigated by the major voice of the community." Id. No. 78, at 528 (Alexander Hamilton).

Although it has long been settled that, notwithstanding these concerns, states may pass laws by initiative, see *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912), direct ballot measures lack the kinds of critical, deliberative filters that the Framers contemplated and that, to some extent, the Constitution created as prerequisites to the passing of legislation. [*860 FN28] Before an initiative becomes law, no committee meetings are held; no legislative analysts study the law; no floor debates occur; no separate representative bodies vote on the bill; no reconciliation conferences are held; no amendments are drafted; no executive official wields a veto power and reviews the law under that

authority; and it is far more difficult for the people to "reconvene" to amend or clarify the law if a court interprets it contrary to the voters' intent. [FN29] The public also generally lacks legal or legislative expertise—or even a duty (as legislators have under Article VI) to support the Constitution. It lacks the ability to collect and to study information that is utilized routinely by legislative bodies. [FN30] Thus, at least in instances like this, in which the measure raises serious constitutional questions, our usual assumption that laws passed represent careful drafting and consideration does not obtain. [FN31]

FN28. See, e.g., Guido Calabresi, *A Common Law for the Age of Statutes* 70-71 (1982) (describing on paucity of procedural protections in initiative process); Julian Eule, *Judicial Review in a Direct Democracy*, 99 *Yale L.J.* 1503, 1525 (1990) (contrasting initiative measures with legislation).

FN29. The financial cost of passing or defeating ballot measures, and of qualifying them for the ballot in the first place, is inordinately high. See, e.g., *Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480, 1498-99 (1996) (describing the costs—in the millions of dollars—of introducing and supporting initiatives in California), vacated on other grounds, 110 F.3d 1431 (9th Cir.1997); Bill Stall & Dan Morain, *Prop. 209 Wins, Bars Affirmative Action Initiatives*, *L.A. Times*, Nov. 6, 1996, at A1 (stating that \$45 million spent by both sides combined on Proposition 211 and that \$85 million was spent on campaigns for initiatives in election).

FN30. As Hans Linde, a former Justice on the Oregon Supreme Court, once explained: Whatever the private goals of the sponsors, once a measure is drafted it is past systematic factfinding, analysis, amendment or compromise. Aside from newspaper editorials or an occasional voters' pamphlet, the debate leading to discussion is left to the electioneering slogans of competing advertising firms. Yet such a measure may repeal, alter, or contradict the most carefully studied and best designed enactment of the legislature.

Hans Linde, *Due Process of Lawmaking*, 55 *Neb. L.Rev.* 197, 228 (1976).

FN31. Compare, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 6 L.Ed. 606 (1827):

It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has

always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench.

Id. at 270.

Moreover, the search for the people's intent in passing initiatives is far different from the attempt to discern legislative intent; there are no legislative hearing transcripts, committee reports, or other legislative history. [FN32] See Jane S. Schachter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 *Yale L.J.* 107 (1995). Proposition 140 suffers from precisely this problem. There is nothing, other than the facially ambiguous initiative, the official ballot arguments and the state-prepared materials, to look to in order to discern the people's intent in passing the measure. And Proposition 140 simply presents us with no evidence, in its language, in the proponents' ballot argument, or in the state-prepared material that the people had adequate notice of the measure's principal objective and most drastic effect: the severe burden, in the form of lifetime term limits, on fundamental voting rights. While the California court relied primarily on the opponents' ballot arguments and secondarily on the Legislative Analyst's report describing the measure, those writings fall far short of what is necessary to meet the due process requirements of fair notice to the voters and a concomitant showing of careful consideration of the burden to be imposed. The Legislative Analyst's report is almost as ambiguous as the initiative itself, and the opponents' arguments are entitled to little weight even under California law. See *Eu*, 54 Cal.3d at 505, 286 Cal.Rptr. 283, 816 P.2d 1309 (stating that an initiative's opponents "frequently overstate the adverse *861 effects of [] challenged measure[s]," and, therefore, that their claims "are not highly authoritative in construing the measure"); [FN33] cf. *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 585, 108 S.Ct. 1392, 1402-03, 99 L.Ed.2d 645 (1988) ("The views of opponents of a bill with respect to its meaning ... are not persuasive."); *NLRB v. Fruit Packers*, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964) ("In their zeal to defeat a bill, [opponents] understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.' ") (quoting *Schwegmann Bros. v. Calvert Distillers*

Corp., 341 U.S. 384, 394-95, 71 S.Ct. 745, 750-51, 95 L.Ed. 1035 (1951)). Thus there is insufficient indication that the voters had adequate notice that the measure would burden so severely the people's fundamental constitutional right to choose their legislative representatives. [FN34]

FN32. Any materials that advocacy groups circulate describing the initiative are not analogous sources, for they are not produced by the voters through a deliberative process. Such materials are, at bottom, only advertisements. Relying on them as indicative of the voters' intent would be tantamount to relying on political parties' campaign advertisements to interpret legislative acts.

FN33. Also compare *San Diego Coast Reg'l Comm'n v. See the Sea, Ltd.*, 9 Cal.3d 888, 891, 109 Cal.Rptr. 377, 513 P.2d 129 (1973) (construing initiative as not imposing construction moratorium because the initiative "[n]owhere ... expressly provide[d] for a moratorium") with *id.* at 897 n. 5, 109 Cal.Rptr. 377, 513 P.2d 129 (Mosk, J., dissenting) (noting that the opponents' ballot argument "warned that the act would impose a moratorium").

FN34. After stating that the California Courts may, under California law, examine material that lies "outside the four corners of the initiative" in order to determine voter intent, the dissent relies extensively on material either not before the California Supreme Court or rejected by it. We are aware, for example, that when the voters adopted Proposition 140 they also rejected Proposition 131, which among other things, provided expressly for state-financed election campaigns as well as consecutive term limits. The California Supreme Court did not mention Proposition 131 in its opinion and the state also does not mention it in its briefs in this case. The state, however, did point out the Proposition in its brief to the California Supreme Court and contended that the court could not reasonably conclude that the voters rejected Proposition 131 on the basis that its term limits were not permanent because "Proposition 131 was 14 pages long (Ballot Pamphlet, pp. 101-105) and covered several, complex issues ... [including] expenditures of public funds, but was vague on the certainty of commensurate revenues." *Br. of Secretary of State, Legislature of the State of Cal. v. Eu*, 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309 (1991), at 25 n. 13. The proponents then seized on the state's argument and urged an opposite position in its reply brief. We agree with the state's argument and with the California Supreme Court's decision to give no weight to the differences in the

term limits language in the two propositions and to decline to speculate as to why the voters adopted one measure and not the other. Although some newspaper articles and the opponents' ballot arguments contrasted the measures as "lifetime limits versus consecutive limits," such editorials and arguments hardly rise to the level of something like legislative history.

[29][30][31][32] Furthermore, when fundamental, constitutional rights, such as voting rights, are at stake, [FN35] basic tenets of procedural due process require states to adopt minimally burdensome safeguards if there is a significant risk of an erroneous deprivation of such a right. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976) (establishing balancing test with respect to those factors). The Supreme Court stated in *Burdick* that "[c]ommon sense, as well as constitutional law, compels the conclusion that [state] government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " 504 U.S. at 433, 112 S.Ct. at 2063 (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974)) (emphasis added). Thus, the state of California has a constitutional obligation to ensure the fairness of its elections, including those involving the initiative process. California, indeed, has adopted several statutory provisions designed to ensure that voters will be afforded fair notice of the contents of ballot measures. See, e.g., Cal. Elec.Code §§ .9051-52 (investing Attorney General with authority to provide a ballot title for initiative measures and to "give a true and impartial statement of the purpose *862 of the measure"); *id.* § 9085 (requiring Legislative Analyst to provide in the ballot pamphlet a summary of the measure); *id.* § 9087 (requiring Legislative Analyst to "generally set forth in an impartial manner the information the average voter needs to adequately understand the measure"). [FN36] In this case, the state could have ensured with only a minimal effort that adequate notice was afforded the voters of the severe burden imposed by the measure. In fact, it appears that all that was necessary to provide adequate notice to the voters that their fundamental voting rights would be so burdened was compliance with the state's own statutes. At no point in the process, however, did either the Attorney General or the Legislative

Analyst include the word "lifetime" or "for life," or even a word such as "permanent," "total," "prohibition," or "ban" in any of the ballot materials that it was their duty to prepare. To the contrary, they perpetuated at every turn the ambiguity created by the measure's proponents. Not only would performing their duties in the manner contemplated by state law have imposed no burden on the state officials, but it would have afforded the voters the notice of the measure's principal effect that due process of law requires.

FN35. Fundamental rights of course qualify as "liberty interests," thus triggering the protections of the Fourteenth Amendment's Due Process Clause. See, e.g., *Paul v. Davis*, 424 U.S. 693, 711 n. 5, 96 S.Ct. 1155, 1165 n. 5, 47 L.Ed.2d 405 (1976) (noting that rights protected by the Bill of Rights are protected by procedural due process requirements).

FN36. Voters may enforce all of these mechanisms in state court, but only to a limited extent. See Cal. Elec.Code § 9092 (allowing voters to seek a peremptory writ of mandate to require title, summary, or statement to be amended or deleted from ballot pamphlet). The California courts will issue such a writ, however, "only upon clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements of [the election code]." *Lungren v. Superior Court*, 48 Cal.App.4th 435, 439, 55 Cal.Rptr.2d 690 (1996). When the Attorney General has already provided an "impartial statement" of the initiative, a voter may not compel a writ to require him "fully [to] state[] the main purpose or chief point of the initiative." See *id.* at 441, 443, 55 Cal.Rptr.2d 690 (vacating lower court order requiring such action).

Similarly, if the proponents of Proposition 140 truly intended to put to the voters the proposal of lifetime term limits, they could have simply put that phrase into the initiative. The phrase is perfectly clear and existed long before the election. This safeguard would have imposed no burden at all on the measure's sponsors, yet would have ensured that voters would have received adequate notice of the initiative's sweeping effect. Cf. *Mathews*, 424 U.S. at 334-35, 96 S.Ct. at 902-03.

Counsel for the state, Professor Elhauge, conceded at oral argument that the voters must be clearly informed of the initiative's effect, and, specifically, that the voters should be advised that "they are adopting term limits for life." [FN37] We agree.

In the state's supplemental brief, however, Professor Elhauge argues that it is immaterial whether the voters understood that Proposition 140 imposed lifetime limits. That is so only in the narrowest sense. If the voters were not adequately informed of the lifetime ban, voter ignorance because of lack of notice is highly material. The state supreme court, the state now urges, "is a lawmaker" for federal constitutional purposes. Supp. Br. at 8. According to the state, we may invalidate the initiative measure only if its effect, as subsequently construed by the California Supreme Court, violates the Constitution, and not because the measure itself as put to the voters concealed its true objective and precluded a fair expression of the voter's will.

FN37. In response to the court's question, "Must it be clearly put to [the voters] so that they know what they are voting on--so that they know that they are adopting these term limits for life?," Professor Elhauge stated, "Well, I think if the question is should it be put to them that they are adopting term limits for life, uh, yes. And I think the answer to that is yes."

[33] We of course acknowledge that the interpretation of a state statute by the state's highest court "puts ... words into the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514, 68 S.Ct. 665, 669-70, 92 L.Ed. 840 (1948); see also, e.g., *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S.Ct. 760, 764-65, 97 L.Ed. 1105 (1953). This line of authority, however, is essentially inapplicable. The issue we face and answer here is not how to construe a state statute that has already been construed by the state supreme court, but whether a state may impose severe burdens on people's most fundamental constitutional*863 rights through an initiative measure that is ambiguous when presented to the voters and that fails adequately to inform the people at the time they cast their ballots that they are being asked to limit their most fundamental rights. It is the measure as presented to the people, and the extent to which that measure informs the voters of the burden that it would impose on their fundamental rights, with which we are concerned--not the "meaning" of the measure as it is subsequently construed or limited by the state supreme court. The meaning afforded a state law by a state's highest court determines the meaning we give the law; it does not resolve the question whether the measure sufficiently advised the voters of the limitations to

be imposed. Given that federal courts are charged with protecting the people's fundamental constitutional rights against undue intrusion by the states, the latter question surely is of federal concern.

[34] Due process and the Supreme Court's established practice of requiring considered decision-making in highly sensitive areas of constitutional law compel our holding. Although we fully accept the California Supreme Court's construction of Proposition 140, the Constitution requires us to invalidate an initiative if it fails to provide adequate notice to the voters that it would severely burden the people's fundamental rights. Here, we hold as a matter of federal law that the state may not enforce Proposition 140's lifetime legislative term limits because the provision imposes a severe limitation on the people's fundamental right to elect whomever they choose and the voters were not provided with adequate notice of that limitation. [FN38]

FN38. We also note that requiring a state to provide adequate notice of an initiative's principal effect if that effect is to severely burden the people's fundamental rights, constitutes a reasonable and effective method of safeguarding the people's right to a republican form of government. Although the Court in *Pacific States* ruled that the Guaranty Clause, U.S. Const., art. IV, § 4, did not impose a substantive limitation on the states' ability to enact laws through the initiative process, nothing in that holding disqualifies federal courts from utilizing other techniques of judicial review to protect the constitutional values at stake. In fact, this is a very similar method to the one that the Court utilizes to protect the constitutional values implicated by its refusal to draw substantive boundaries to cabin the non-delegation doctrine, see *Mistretta v. United States*, 488 U.S. 361, 371-79, 109 S.Ct. 647, 654-59, 102 L.Ed.2d 714 (1989), and to protect states' "fundamental functions" from federal intrusion under the Commerce Clause. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (holding such intrusion nonjusticiable) with *Gregory*, 501 U.S. at 457-64, 111 S.Ct. at 2399-2403 (adopting plain statement rule). Precisely because the people may enact any type of law they wish by initiative, and because most of the deliberative filters of legislation have been removed, federal courts must ensure that states do not exploit the deficiencies of direct democracy to limit the people's rights through ambiguous initiatives that fail to disclose the true objectives of the measure.

[35] Although we recognize and appreciate that states have an important constitutional interest in designing their own political institutions, we conclude that when a state uses an initiative to adopt a form of governmental structure that severely burdens the fundamental rights of voting and association, due process requires that the state give the voters notice of the limitation that the measure would impose. Absent adequate notice, we cannot hold that the people intended severely to burden their most fundamental right, the right to vote. In matters this important, the state simply must tell its citizens what they are voting on.

IV. Conclusion

[36] This conclusion leaves us no choice but to invalidate the legislative-term-limits provision of Proposition 140. As we stated above, and as the state correctly reminds us, the California Supreme Court's determination that the measure imposes a lifetime ban, *Eu*, 286 Cal.Rptr. at 290, 816 P.2d at 1316, prevents us from narrowly construing the initiative, potentially to save its constitutionality; "[w]e must take the statute as though it read precisely as the highest court of the State has interpreted it." *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273, 60 S.Ct. 523, 525, 84 L.Ed. 744 (1940); accord *Easyriders Freedom F.I.G.H.T.*, 92 F.3d at 1494 n. 4.

[37][38][39] Nor may we sever the lifetime limits requirement. Severability is a question of state law. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506, 105 S.Ct. 2794, *864 2803, 86 L.Ed.2d 394 (1985). California law prescribes three criteria for severability: (1) the invalid provision must be mechanically and grammatically separable; (2) it must be functionally separable; and (3) the remainder of the law would have been adopted by the legislative body if it had foreseen the partial invalidity of the law. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 258 Cal.Rptr. 161, 771 P.2d 1247 (1989). Putting aside the difficulties discussed, *supra* at 860, surrounding any attempt to divine the "intent" of the people, it is apparent that the first criterion is not met here. There is no lifetime limits "provision" that is "mechanically and grammatically separable." *Id.*

Hence, we have no choice but to invalidate the provision for legislative term limits. In doing so,

however, we reiterate that we express no view as to the right of the state to adopt lifetime term limits for legislative office. That is an important and difficult constitutional question, but it is one that we defer to another day.

The judgment of the district court is

AFFIRMED.

SNEED, Circuit Judge, Dissenting:

I respectfully dissent. The majority opinion states its holding as follows:

Here, we hold as a matter of federal law that the state may not enforce Proposition 140's lifetime legislative term limits because the provision imposes a severe limitation on the people's fundamental right to elect whomever they choose and the voters were not provided with adequate notice of that limitation.

Maj. op. at p. 863.

The holding of this court ought to be:

The wording of Proposition 140 and the context in which it was debated before the election was sufficiently expressed to assure an informed vote thereon and Proposition 140 does not contravene the Fourteenth Amendment and the Bill of Rights as incorporated therein.

The voters were properly informed that Proposition 140 imposed lifetime limits and it does not "limit their most fundamental rights." In fact, Proposition 140 is an expression of the fundamental right of the citizens of California to be served by state legislators holding office for such terms as they direct.

I. NOTICE

The ambiguity issue raised by the majority was resolved satisfactorily by the Supreme Court of California in *Legislature v. Eu*, 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309 (1991). In *Eu*, a suit by the California legislature challenging Proposition 140, the court discussed the question of whether the initiative imposes a lifetime ban on officers who have served the specified number of terms. The court did note that "the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban." *Eu*, 54 Cal.3d at 504, 286 Cal.Rptr. 283, 816

P.2d 1309. Under California law, however, it is appropriate for the court to examine indications of voter intent that lie outside the four corners of the initiative. *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal.3d 245, 250, 279 Cal.Rptr. 325, 806 P.2d 1360 (1991). The majority, by relying on *Thompson v. Oklahoma*, 487 U.S. 815, 857, 108 S.Ct. 2687, 2710-11, 101 L.Ed.2d 702 (1988), accept this principle of interpretation. In conducting this inquiry, the *Eu* court found ample indications of the voters' intent by analyzing comments in the official ballot pamphlet. These comments "strongly support" the claim that a lifetime ban was contemplated by both the framers of Proposition 140 as well as the voters who approved it. *Eu*, 54 Cal.3d at 505-06, 286 Cal.Rptr. 283, 816 P.2d 1309.

The "Argument Against Proposition 140," included in the ballot pamphlet accompanying the initiative, clearly states that legislative officers are "banned for life" after serving a set number of years. Ballot Pamph., Proposed Stats. and Amends. to Cal. Const. with argument to voters, Gen. Elec. (Nov. 6, 1990), p. 70-71. In fact, as the *Eu* court observed, the argument utilizes such unambiguous phrases 11 times. So too, an examination of the proposition by the Legislative Analyst noted that the term limits provision *865 limited "the number of terms an elected state official can serve in the same office," saying nothing about a possible return to office at any point in the future. *Id.* at 69. Nowhere in the statements made by Proposition 140 advocates is the claim made that a lifetime ban is not imposed by the measure. *Id.* at 70-71. This powerful evidence led the court to properly conclude that the average voter would have known that Proposition 140 imposed lifetime term limits. *Eu*, 54 Cal.3d at 505, 286 Cal.Rptr. 283, 816 P.2d 1309. The indicia of voter awareness and intent, however, are even stronger than the California Supreme Court suggested.

In 1990, voters had not one but two term limit measures on which to pass judgment. In addition to Proposition 140, a coalition of reform-minded groups placed Proposition 131 on the ballot. Proposition 131 limited state executive officers to up to eight consecutive years of service, while legislators were restricted to 12 years in office. Proposition 131, however, also explicitly allowed officeholders to regain their eligibility to run for the same elected position in the future, provided they sat

out at least one term. The comments in the ballot pamphlet regarding Proposition 131 made it clear that the initiative imposed only consecutive, as opposed to lifetime, limits. Ballot Pamp. at 32.

Moreover, the clear choice facing voters—between the lifetime limits (imposed by Proposition 140) and consecutive term limits (imposed by Proposition 131)—received extensive media attention. See, e.g., Paul Jacobs, Term Limits Would Oust Lawmakers and a System, L.A. Times, Oct. 13, 1990, at A1 (noting that Proposition 140 would limit "lifetime service" in the legislature, while Proposition 131 would "force members of each house to move on after 12 consecutive years," but would also allow them to run again after "sitting out a term."); Steven A. Capps, Lawmakers lying low in Capitol quietly fighting Props. 131, 140, S.F. Examiner, Sept. 16, 1990, at B1 (noting that "most legislators consider Prop. 140 the more evil of the two initiatives" because it would impose "lifetime term limits.").

In addition to the usual media attention afforded controversial ballot measures, the distinction between the two term limit schemes offered by Propositions 131 and 140 was highlighted even further when, five days before the election, the California Supreme Court issued a ruling directly involving the two initiatives. The court announced that when voters approved propositions that were in fundamental conflict, no part of the ballot measure receiving the fewer votes may take effect. *Taxpayers To Limit Campaign Spending v. Fair Political Practices Comm.*, 51 Cal.3d 744, 274 Cal.Rptr. 787, 799 P.2d 1220 (1990). This decision was widely interpreted to potentially impact Propositions 131 and 140, should voters approve both measures. See, e.g., Philip Hager & Richard C. Paddock, Proposition With Most Votes Would Nullify Rival, L.A. Times, Nov. 2, 1990, at A1 (noting that "Propositions 131 and 140 on Tuesday's ballot conflict because they would impose different term limits for office holders.").

As of Sept. 30, 1990, polls indicated that voters were in favor of Proposition 131 by 50 percent to 34 percent, with 16 percent undecided. Proposition 140 was supported by 55 percent and opposed by 28 percent, with 17 percent undecided. George Skelton, Legislative Term Limits Backed by Big Margin, L.A. Times, Sept. 30, 1990, at A1. Only a

week later, however, Proposition 131 was rejected by a margin of nearly two-to-one, while Proposition 140 was approved. This clearly suggests that the state Supreme Court decision may have prompted voters to make a conscious choice between what particular term limits plan they desired to implement, rather than expressing general support for both plans as the polls suggest they did prior to the ruling. Alternatively, it may be that other differences between the propositions swayed voters in the closing days of the campaign. [FN1] In any event, it is abundantly *866 clear that the issue was widely discussed and publicized. See *California Newspapers Fill Out Their Ballots*, L.A. Times, Nov. 4, 1990, at M8 (listing 31 California newspapers that had taken an editorial position on both Propositions 131 and 140). Indeed, it is fair to say that the juxtaposition of two conflicting term limit provisions in the same election makes it highly likely that voters were aware about the true nature of their ballot choice.

FN1. Proposition 131 would have allowed taxpayers to divert up to \$5 per year of their state taxes to a special election fund that would provide partial funding for the campaigns of all state officials. It would also have instituted a ban on non-election year fund raising, and limited total spending for candidates who refused public funds. Proposition 140 slashed operating funds for the legislature and eliminated the legislative retirement system.

There is nothing in this record to suggest that any possible confusion on the part of California voters provides a basis for this Court to employ its power under the second sentence of Section 1 of the Fourteenth Amendment to set aside a state election. The people of California understood what they were voting for. The text of Proposition 140 indicates it was intended to curb "[t]he ability of legislators to serve unlimited number of terms." Ballot Pamp. at 137 (Text of Proposed Law). To effectuate that end, the drafters of the measure stated precisely that "[n]o Senator may serve more than 2 terms ... [n]o member of the Assembly may serve more than 3 terms ..." *Id.* As the majority sees it, the absence of the words "during a lifetime" invalidates the proposition's favorable vote. For the want of three words the proposition fails. To such uses is the revered Fourteenth Amendment now employed!

The Twenty-Second Amendment to the Constitution does not employ the clause "during a lifetime." It

provides, "[n]o person shall be elected to the office of the President more than twice ..." U.S. Const. amend. XXII. It is obvious that it means "during a lifetime." Similarly, the language "no (Senator or Assembly member) may serve more than (2 or 3) terms" also obviously means service "during a lifetime."

The majority can discover "ambiguity" and a failure to adequately inform the people only by distorting the precise language of Proposition 140 and employing a canon of construction resembling that which once applied in the common law in an action on the covenant. Bouvier's Law Dictionary 251-52 (3d ed.1934).

II. RIGHTS OF VOTERS

Nonetheless, the majority relies primarily on the assertion that Proposition 140 limits the fundamental right of voters to vote for those legislators who no longer can seek a previously held office. By linking this proposition with its earlier determination that Proposition 140 did not provide adequate notice to the voters of its meaning, the majority reaches its improper and intrusive holding.

This holding represents a remarkable intrusion by the federal judiciary into the voter initiative process in the State of California and all other states in this circuit having such a process. It means, at the very least, that a term limits initiative measure can become effective only when approved by the federal courts. Only then can it be determined that proper notice was given or that the lack of such notice did not affect the outcome. The likelihood of similar safeguards being designed by which other types of voter initiatives may be measured is not remote.

However, for purposes of this dissent, it will be assumed that the majority's holding is applicable only to voter initiatives instituting term limits. As to such it holds they "impose a severe limitation on the people's fundamental right to elect whomever they choose." Such voter initiatives can be rejected by a majority of the voters, but apparently they cannot be adopted by a majority, no matter what its size, without the intensive judicial scrutiny set forth above. This lack of symmetry exposes the flaw in the majority's "fundamental right" impairment analysis. The majority opinion regards term limits

as specifically directed at a group of voters having nothing in common other than the fact that they lost an election on term limits. To provide protection to this group, the majority opinion creates a fundamental right "to elect whomever they choose." This amounts to holding that when a majority of voters impose term limits on state legislators they engage in a constitutionally suspect act, suggesting a form of discrimination deserving strict scrutiny for purposes of determining the Fourteenth Amendment's application.

*867 The flaw in this reasoning is that there is no constitutional right "to elect whomever they choose" when the majority of the electorate has determined a candidate is not entitled to serve. To suggest otherwise must be rooted in an antipathy to term limits for which our national experience provides no basis. The Constitution of the United States in Article I, Sections 2 and 3 imposes qualifications that a person must meet to become a Representative or Senator in the Congress of the United States. Moreover, the Supreme Court has upheld several state-imposed restrictions which in one way or another have limited a voter's right to elect "whomever they choose."

For example, *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) upheld a state-imposed prohibition on voting for candidates who have not filed nominating papers and whose names do not appear on the ballot. The majority attempts to distinguish this case on the grounds of inadequate notice, a grounds already refuted. Similarly, the Supreme Court upheld a state requirement that a minority party candidate for a partisan office must have received at least one percent of all votes cast for that office in the state's primary election in order to have his or her name placed on the general election ballot. *Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986). The restriction in the former was treated as "a very limited one," *id.* at 437, 112 S.Ct. at 2065, and in the latter as a "reasonable restriction on ballot access." *Id.* at 195, 107 S.Ct. at 537.

Even more restrictive measures were upheld by the Supreme Court in *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). The first such measure was a requirement that certain elected and appointed officeholders who became

candidates for a different elective office are deemed to have automatically resigned from their current office. The second measure required that certain officeholders complete their current term before being eligible to serve in the legislature. Both measures were upheld against claims based on the First Amendment and the Fourteenth Amendment's Equal Protection Clause.

The Court focused on two lines of "ballot access" cases. First are those involving classifications based on wealth, and those involving classification schemes that impose burdens on new or small parties or independent candidates. Both must be subjected to heightened scrutiny. *Id.* at 962-65, 102 S.Ct. at 2843-45. With respect to other ballot access restrictions, however, the Court stated that "neither the Equal Protection Clause nor the First Amendment authorizes this Court to review ... the manner in which a State has decided to govern itself." *Id.* at 972, 102 S.Ct. at 2848. Clearly, state-imposed term limits on legislators fall within this latter category; they constitute a "manner in which a State has decided to govern itself."

Three cases decided prior to those just mentioned also involved state laws that can be placed under the heading of state self-governance. These were *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); and *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). In *Storer*, the Court upheld a provision forbidding a ballot position to an independent candidate for elective office if that person had a registered affiliation with a qualified political party within one year prior to the primary election in which the person seeks to run as an independent. 415 U.S. at 736, 94 S.Ct. at 1282.

The Court in *American Party of Texas* also rejected several constitutional challenges to the Texas Election Code. In so doing, it observed that the Code "affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more." 415 U.S. at 788, 94 S.Ct. at 1309.

In *Jenness*, the Court upheld a substantial barrier to

access to the ballot in the general election by a candidate who did not enter and win a political party's primary election. Access by such a person required that there be *868 filed on his behalf a nominating petition signed by at least five percent of the eligible voters. *Id.* at 432, 91 S.Ct. at 1971.

These authorities amply demonstrate that there is no "fundamental right to vote for whomever one chooses." True, the right to vote cannot be restricted by a classification or requirement based on wealth. See *Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974) (large filing fee to gain access to the ballot in a primary election for County Supervisor was a denial of equal protection). A similar holding was reached in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). Term limits, however, embody no discrimination between voters or office seekers on the basis of race, creed, color, or wealth. Rather, one who has had the honor of serving the required number of terms can simply no longer stand for election nor can his or her supporters vote for them. Term limits is a device which its proponents insist will improve government. Whether it does so or not poses no federal constitutional question.

III.

U.S. TERM LIMITS, INC. v. THORNTON, 514 U.S. 779 (1995)

Thornton does not support the arguments against term limits. At page 837, 115 S.Ct. at page 1871 of the majority opinion, the Court stated:

Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents. It is not our province to resolve this long-standing debate.

We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework.

Thus, Thornton did not hold that term limits per se are unconstitutional. What it held was that the Qualifications Clause of the Constitution, Article I, Section 5, proscribed the establishment of term limits by a state for its representatives and senators serving in the Congress of the United States. 514

U.S. at 831, 115 S.Ct. at 1868. In so holding, it rejected the argument that the "Times, Places and Manner of holding Elections" Clause, Article I, Section 4, which vested authority in the states to prescribe such matters, compelled a different result. *Id.* at 832, 115 S.Ct. at 1868-69.

The constitutional philosophy supporting this holding was expressed concisely by Justice Kennedy in his concurring opinion:

Federalism was our nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from inclusion by the other. The resulting Constitution created a legal system and form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution. 514 U.S. at 838-39, 115 S.Ct. at 1872.

Thus, Thornton does not control this case. Its reach is limited to proscribing efforts by the states to limit the terms of members of the Congress of the United States chosen by the electorate of such states. It imposes no constitutional bar to term limits enacted by a direct vote of the people of a state on their representatives in the state's legislature.

IV.

TERM LIMITS AS A POLICY

Term limits, to repeat, are part of the Constitution of the United States, with respect to the office of the President of the United States. U.S. Const. amend. XXII. *869 As a constitutional amendment properly adopted, it is not considered, even though beyond challenge in federal courts, to constitute a provision out of harmony with the remainder of the Constitution. It reflects a policy initiated by President Washington and followed by many presidents prior to the adoption of the Amendment.

Term limits applicable to executive and legislative officials has an appeal to the ordinary citizen whose instincts and experience strongly suggest that such officials can, and sometimes do, abuse the power

they possess. Even judges do not always escape this public suspicion, despite the fact that their power is more passive and quite procedurally circumscribed.

The support for term limits is not solely instinctual, however. Several substantial rational arguments can be made in their favor. The strongest is that long-term state legislators inevitably create a power center within the body in which they serve that often results in providing more financial and other types of benefits to their constituency than to other constituencies. This enhances the prospects of their reelection and the continuation of their practices. In time this uneven and often excessive misallocation of public resources becomes visible even to those members of the public who seldom devote close attention to state legislative activities. To this portion of the public, as well as to some who follow these matters more closely, the imposition of term limits appears to be a way to limit this tendency.

Legislative fiefdoms resulting in long-term service by a legislator also can enable that legislator to defy the majority will, at least for a significant period of time, on a matter of statewide importance. Less frequently, but of more serious consequences, is the legal and moral corruption of the long-term legislator. Whether Lord Acton was completely right or not, it is a fact that substantial power long held is a fertile source from which corruption can spring.

However, the arguments against term limits are also strong. First, our experience with Congress and other state legislative bodies is that unbroken service by a legislator or congressman provides the states and the United States with many persons of great experience and wisdom, without whom all would be poorer and less enlightened.

Moreover, there is force in the contention that the people of a particular constituency should be entitled to elect an incumbent for as long as they choose.

The truth is that term limits and their absence are both reasonable policies with respect to those who serve as state legislators. Moreover, the states, consistent with their unique ability to serve as a laboratory in which certain political theories and practices are tested, should be permitted to experiment with term limits. To impose a constitutional ban against California's term limits

experiment is both improper and insensitive to the federal nature of the United States. Experiments of this type are an often heralded feature of federalism. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386-87, 76 L.Ed. 747 (1932) Brandeis, J., dissenting ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory ..."). To employ the Fourteenth

Amendment to frustrate such experiments is to diminish one of its fundamental purposes, which was to secure for all persons the opportunity to participate in the political processes of the states. It does not guarantee that an individual should be permitted to hold a particular legislative office indefinitely.

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APR 23 1997

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No.C 95-02638 CW

TOM BATES; EDWARD H. LYMAN; RICHARD
STERLING; ARDIS GRAHAM; RICHARD D.
LEWIS; LAWRENCE J. BUCHALTER;
JONATHAN BROWNING; RACHEL SHERMAN;
MARTHA M. ESCUTIA; SYLVIA HERNANDEZ;
ANA ROSA PENA; CLAUDIA NAVAR; BARBARA
J. FRIEDMAN; SUSAN ZARAKOV; and
HARRIET SCULLY,

JUDGMENT

Plaintiffs,

v.

BILL JONES, Secretary of the State of
California; BRADLEY J. CLARK; Alameda
County Registrar of Voters; and CONNY
MCCORMACK, Los Angeles County
Registrar of Voters,

Defendants.

PETER F. SCHABARUM; LEWIS K. UHLER,

Intervenors.

This action came on for trial before the Court, the Honorable
Claudia Wilken, United States District Judge, presiding, and the
issues having been duly tried and the Court having duly rendered
its decision as set forth in the Findings of Fact and Conclusions
of Law filed April 23, 1997,

APR 23 1997

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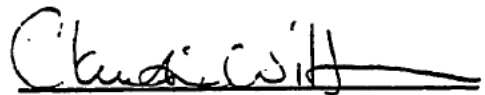
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IT IS HEREBY ORDERED AND ADJUDGED:

1. that the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution violate the United States Constitution;
2. that Defendants Clark and McCormack are enjoined from enforcing the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution against Plaintiffs and to accept the declarations of intention to be a candidate and the nomination papers when tendered by Plaintiffs Bates, Friedman, or Escutia; and
3. that Defendant Jones is enjoined from enforcing the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution against Plaintiffs, to accept and process the declarations of intention to be a candidate and the nomination documents of Plaintiffs Bates, Friedman, or Escutia, to certify Plaintiff legislators' eligibility to be candidates (if all other requirements are met), and to certify the elections results if Plaintiff legislators win the election.

Plaintiffs shall recover of Defendants their costs of action.

Dated: APR 23 1997



CLAUDIA WILKEN
United States District Judge

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FILED

APR 23 1997

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 95-02638 CW

TOM BATES; EDWARD H. LYMAN; RICHARD
STERLING; ARDIS GRAHAM; RICHARD D.
LEWIS; LAWRENCE J. BUCHALTER;
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MARTHA M. ESCUTIA; SYLVIA HERNANDEZ;
ANA ROSA PENA; CLAUDIA NAVAR; BARBARA
J. FRIEDMAN; SUSAN ZARAKOV; and
HARRIET SCULLEY,

FINDINGS OF FACT
AND CONCLUSIONS
OF LAW

Plaintiffs,

v.

BILL JONES, Secretary of State of the
State of California; BRADLEY J.
CLARK, Alameda County Registrar of
Voters; and CONNY MCCORMACK, Los
Angeles County Registrar of Voters,

Defendants.

PETER F. SCHABARUM and LEWIS K.
UHLER,

Intervenors.

INTRODUCTION

Do the lifetime legislative term limits provisions of the
California Constitution, as enacted by Proposition 130 in 1990,
violate the United States Constitution? This question implicates

1 some of the core values of our American system of government:
2 majority rule, minority protections, the right to vote, the
3 autonomy of the States, and the role of the federal courts in
4 upholding constitutional principles.

5 Majority rule is the basic assumption of American government.
6 The legitimacy of the democratic process, however, depends upon the
7 ability of voters to express their political preferences at the
8 ballot box. "The right to vote freely for the candidate of one's
9 choice is of the essence of a democratic society, and any
10 restrictions on that right strike at the heart of representative
11 government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). The
12 Constitution provides a number of safeguards to protect the right
13 of the people to vote for their representatives. Some of these
14 safeguards are explicit, such as the right to vote regardless of
15 race or gender. The United States Supreme Court has found others
16 to be implicit, such as the principle of one person, one vote. The
17 Supreme Court has observed that congressional term limits "violate
18 that 'fundamental principle of our representative democracy . . .
19 that the people should choose whom they please to govern them.'" U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1850, 1862
20 (1995) (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969)).

21 The United States Supreme Court has held that a State may
22 impose reasonable, nondiscriminatory restrictions on the ability of
23 citizens to vote for the candidate of their choice when the State
24 has an important reason for imposing those restrictions. When a
25 State's restrictions on the ability of potential candidates to run
26 for office impose a severe burden on voters' or candidates' First
27

1 or Fourteenth Amendment rights, however, the State must establish
2 that those restrictions are narrowly tailored to accomplish
3 compelling State interests. Otherwise the restrictions are
4 unconstitutional. Burdick v. Takushi, 504 U.S. 428, 434 (1992).
5 Permissible restrictions typically require candidates to
6 demonstrate a modicum of popular support or to comply with
7 reasonable procedures meant to insure orderly elections.

8 California's version of lifetime legislative term limits
9 differs from the restrictions that the Supreme Court has upheld in
10 the past in that it imposes an absolute and permanent ban on the
11 participation of a certain category of candidates: experienced
12 legislators. This lifetime restriction on legislative service
13 prevents voters who value legislative experience from expressing
14 their preference when voting for their State legislators. It also
15 permanently bars voters who support a particular term-limited
16 candidate for the legislature from stating their support at the
17 ballot box. Finally, it burdens voters' right to associate for the
18 advancement of their political views by denying them the
19 opportunity to rally around the candidates of their choice.
20 California's version of term limits thus severely burdens the
21 political process by denying voters the opportunity to vote for a
22 category of candidates or for particular individuals whom they
23 support.

24 California's sovereign interest in structuring its political
25 institutions is due substantial deference. When a State
26 restructures its political institutions in a manner that imposes a
27 severe burden on the ability of citizens to vote for the

1 representatives of their choice, however, the State must provide
2 justifications in addition to its interest in determining its own
3 political institutions. Otherwise State institutional decisions
4 would be immune from federal constitutional scrutiny. The State
5 also has a substantial interest in promoting political
6 accountability. However, at the trial of this case, the State
7 failed to establish, as it must, that a lifetime limit on
8 legislative service is narrowly tailored to achieve this interest.
9 Less restrictive versions of term limits would achieve the benefits
10 attributed to lifetime term limits while imposing significantly
11 less severe burdens on the rights of voters. Other reforms that do
12 not restrict the ability of voters to vote for the candidates of
13 their choice would also achieve the benefits attributed to lifetime
14 term limits.

15 This Court does not lightly overrule the political judgment of
16 the California electorate. However, it is the singular duty of a
17 federal court to determine when political judgment must give way to
18 constitutional principle. "One's right to life, liberty, and
19 property . . . and other fundamental rights may not be submitted to
20 vote; they depend on the outcome of no elections.' A citizen's
21 constitutional rights can hardly be infringed simply because a
22 majority of the people choose that it be." Lucas v. Forty-Fourth
23 General Assembly, 377 U.S. 713, 736-37 (1964) (quoting West
24 Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943))
25 (footnote omitted). When a law conflicts with the United States
26 Constitution, it is the Constitution, not the expressed will of a
27 majority of the voters, that must govern the Court's decision. "It

1 is, emphatically, the province and duty of the judicial department,
2 to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch)
3 137, 176 (1803).¹ Because California's extreme version of term
4 limits imposes a severe burden on the right of its citizens to vote
5 for candidates of their choice, and because it is not narrowly
6 tailored to advance compelling State interests, it violates the
7 First and Fourteenth Amendments of the United States Constitution.

8
9 PROCEDURAL BACKGROUND

10 Former Assembly member Tom Bates and some of his supporters
11 filed this lawsuit in 1995, seeking to enjoin enforcement of
12 California's term limits so that Bates could run for reelection in
13 1996 to an eleventh term in the Assembly. The Court permitted the
14 official proponents of Proposition 140, Peter Schabarum and Lewis
15 Uhler, to intervene as Defendants. Bates v. Jones, 904 F. Supp.
16 1080, 1086 (N.D. Cal. 1995).² The Court denied Plaintiffs' motion
17 for a preliminary injunction, as well as Defendant Secretary of

18 ¹The Ninth Circuit's recent observation that judges should not
19 unnecessarily thwart the political will of the people does not
20 negate the Court's duty to enforce the United States Constitution.
21 See Coalition for Economic Equity v. Wilson, Nos. 97-15031, 97-
22 15030, 1997 WL 160667, at *4 (9th Cir. Apr. 8, 1997). As the Ninth
23 Circuit recognized, if an initiative violates the Constitution, the
24 district judge must "remind[] the people that they must govern
25 themselves in accordance with" constitutional principles. Id.

26 ²In granting Intervenor's motion to intervene, the Court
27 relied upon Yniquez v. Arizona, 939 F.2d 727 (9th Cir. 1991), which
28 held that sponsors of ballot initiatives have standing to defend
them against court challenges. Recently, the Supreme Court
questioned the reasoning in Yniquez. See Arizonans for Official
English v. Arizona, 117 S. Ct. 1055, 1067-68 (1997). It is thus
doubtful that Intervenor's have standing. Because the State clearly
does have standing to defend provisions of its own constitution,
Arizonans for Official English does not affect the current posture
of this case.

1 State Bill Jones' motion to dismiss for failure to state a claim.
2 Id. at 1098.

3 In March, 1996, Defendants moved for summary judgment, and
4 Plaintiffs moved for leave to amend their complaint by adding as
5 new Plaintiffs Assembly members Martha Escutia and Barbara Friedman
6 and some of their constituents. The Court denied Defendants'
7 motion for summary judgment and granted Plaintiffs' motion for
8 leave to amend. Order, May 30, 1996.

9 Trial was conducted from October 15 to October 24, 1996.
10 Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the
11 Court makes the following findings of fact and conclusions of law.

12 FACTUAL BACKGROUND

13 A. History of Term Limits

14 The movement to impose legislative term limits is a recent
15 phenomenon, although one with some historical precedent in the
16 eighteenth and nineteenth centuries.

17 The expectation that legislators would serve in office for a
18 limited period of time, return to private life, and then perhaps
19 serve again later, was widespread in colonial America. This
20 practice was known as "rotation." Tr. 603 (Petracca).³ Rotation
21 was generally an informal social norm rather than a legal mandate,
22 but the Frameworks of Pennsylvania and Delaware, drafted in the
23 1680s, explicitly required it. Tr. 604. However, no colony

24
25 ³Mark Petracca was the State's expert witness on term limits.
26 An associate professor of political science at the University of
27 California, Irvine, he has written extensively in favor of term
limits and is a member of the board of Legal Limits, a periodical
which reviews legal cases involving term limits.

1 imposed a lifetime limit on legislative service. Tr. 609. After
2 independence, the Articles of Confederation limited delegates to
3 Congress to three years of service in any period of six years.
4 U.S. Term Limits, 115 S. Ct. at 1865-66; Articles of Confederation,
5 art. V. The bills of rights of Massachusetts, Virginia, and a few
6 other States enunciated the principle of rotation, but did not
7 impose specific limits on legislative service. Tr. 604, 608. Of
8 the States, only Pennsylvania formally required legislators to
9 leave office after a specified period of time. No State imposed a
10 lifetime limit on legislative service. Tr. 609.

11 Although the Constitutional Convention considered proposals to
12 require members of Congress to rotate out of office, none was
13 adopted. Tr. 89 (Fiorina); Tr. 397 (Jacobson);⁴ U.S. Term Limits,
14 115 S. Ct. at 1859 & n.22.

15 During most of the nineteenth century, rotation of office
16 continued to be widely expected and practiced, but it was never
17 formally imposed. Tr. 605 (Petracca). Especially after the
18 presidency of Andrew Jackson, rotation came to be associated with
19 the spoils system. It served as a device for insuring that the
20 various elements of political coalitions all shared in the fruits
21 of power. Tr. 90-91 (Fiorina). By the early twentieth century,
22 however, rotation had become less prevalent. Tr. 607.

23 From the colonial era through the nineteenth century, the

24
25 ⁴Morris Fiorina and Gary Jacobson were Plaintiffs' expert
26 witnesses. Fiorina is a professor of Government at Harvard
27 University. He has written extensively about representation and
electoral accountability. Jacobson, a professor of political
science at the University of California, San Diego, has written
extensively on congressional elections.

1 practice of rotation of office was distinct from the modern
2 phenomenon of legislative term limits. Most importantly, rotation
3 did not impose lifetime limits on the length of legislative
4 service. Tr. 609 (Petracca); Tr. 91-92 (Fiorina). As the word
5 "rotation" suggests, legislators were expected to serve for a
6 period of time and then do something else, but former legislators
7 were not barred from returning to the legislature after having
8 taken some time off. Indeed, many nineteenth-century legislators
9 were professional politicians. It was simply understood that one
10 politician would not hold onto a particular office for a prolonged
11 period of time. Tr. 92 (Fiorina). Candidates were generally not
12 forbidden from seeking additional terms, and voters were not
13 prevented from supporting them.

14 B. Professional Legislatures and Legislative Turnover

15 By the middle of the twentieth century, the ideal of a
16 professional legislature capable of handling the complexities of
17 modern, industrialized society and of countering executive
18 authority largely supplanted the ideal of a citizen legislature
19 made up of representatives who would return to private life after
20 brief periods of legislative service. Tr. 68, 84 (Fiorina). After
21 the Second World War, Congress and many State legislatures,
22 including California's, became increasingly professionalized. Tr.
23 345 (Jacobson). Indeed, in 1966, Californians approved Proposition
24 1A, which institutionalized the ideal of a professional
25 legislature. Legislators' salaries rose, legislative staffing
26 increased, and legislative supervision of the budgetary process
27 became more sophisticated. Tr. 97 (Fiorina).

1 In the late 1980s and the 1990s, sentiment grew that
2 legislators were becoming too secure and isolated and therefore
3 less responsive to their constituents. As a remedy for this
4 perceived problem, twenty-one States enacted some form of
5 legislative term limits. Most States with term-limits provisions
6 restrict the number of consecutive terms that legislators may serve
7 or limit the number of years that an individual may serve as a
8 legislator within a specified time frame. Six States other than
9 California have imposed lifetime limits on legislative service.⁵

10 Most courts have rejected challenges to the constitutionality

11
12 ⁵The seven States with lifetime limits on legislative service
13 are Arkansas, Ark. Const. Amend. 73, § 2 (three terms in lower
14 house, two terms in upper house); California, Cal. Const. art. V, §
15 2 (three terms in lower house, two terms in upper house); Michigan,
16 Mich. Const. art. IV, § 54 (three terms in lower house, two terms
17 in upper house); Missouri, Mo. Const. art. III, § 8 (eight years in
18 one house, sixteen years in both houses); Nevada, Nev. Const. art.
19 IV, §§ 3-4 (twelve years in lower house, twelve years in upper
20 house); Oklahoma, Okla. Const. art. V, § 17A (twelve years service
21 in both houses); and Oregon, Ore. Const. art. II, § 19 (six years
22 in lower house, eight years in upper house, or twelve years in both
23 houses).

24 The fourteen States with some other form of term limits are
25 Arizona, Ariz. Const. art. IV, pt. 2, § 21 (four consecutive
26 terms); Colorado, Colo. Const. art. V, § 3 (four consecutive terms
27 in lower house, two consecutive terms in upper house); Florida,
28 Fla. Const. art. VI, § 4 (eight consecutive years); Idaho, Idaho
Code § 34-907 (eight years of service within previous fifteen
years); Louisiana, La. Const. art. III, § 4(E) (three consecutive
terms); Maine, Me. Rev. Stat. Ann. tit. 21-A, § 553 (four
consecutive terms); Massachusetts, Mass. Ann. Laws ch. 53, § 48
(four terms in preceding nine years); Montana, Mont. Const. art. IV,
§ 8 (eight years within preceding sixteen years); Nebraska, Neb.
Const. art. III, § 8 (two consecutive terms); Ohio, Ohio Const.
art. II, § 2 (four consecutive terms in lower house, two
consecutive terms in upper house); South Dakota, S.D. Const. art.
III, § 6 (four consecutive terms); Utah, Utah Code Ann. § 20A-10-
201 (twelve consecutive years); Washington, Wash. Rev. Code §
44.04.015 (six of previous twelve years in lower house, eight of
previous fourteen years in upper house); and Wyoming, Wyo. Stat. §
22-5-103 (twelve of previous twenty-four years).

1 of term limits for State or local legislators.⁶

2 C. Proposition 140 and Legislature v. Eu

3 In the late 1980s, the California legislature was perceived by
4 some to be under the control of a group of entrenched politicians
5 more concerned with their own political survival than with the
6 interests of their constituents or the well-being of the State.
7 Proposition 140 was promoted as a means to break the grip of career
8 politicians on the legislature and to promote greater public
9 participation in the political process. The statement of purpose
10 in Proposition 140 pronounced,

11 The people find and declare that the Founding Fathers
12 established a system of representative government based
13 upon free, fair and competitive elections. The increased
14 concentration of political power in the hands of
15 incumbent representatives has made our electoral system
16 less free, less competitive, and less representative.

17 The ability of legislators to serve unlimited number of
18 terms, to establish their own retirement system, and to
19 pay for staff and support services at state expense
20 contribute heavily to the extremely high number of
21 incumbents who are reelected. These unfair incumbent
22 advantages discourage qualified candidates from seeking
23 public office and create a class of career politicians,

24 ⁶See Dutmer v. City of San Antonio, 937 F. Supp. 587 (W.D.
25 Tex. 1996); League of Women Voters v. Diamond, 923 F. Supp. 266 (D.
26 Me.) (denying preliminary injunction), aff'd, 82 F.3d 546 (1st Cir.
27 1996); Miyazawa v. City of Cincinnati, 825 F. Supp. 816, 817 (S.D.
Ohio 1993), aff'd on other grounds, 45 F.3d 126 (6th Cir. 1995);
28 U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994), aff'd
on other grounds, 115 S. Ct. 1842 (1995) (the constitutionality of
State legislative term limits was not presented to the United
States Supreme Court); Legislature v. Eu, 54 Cal. 3d 492 (1991),
cert. denied, 503 U.S. 919 (1992); Roth v. Cuevas, 603 N.Y.S.2d 962
(Sup. Ct.), aff'd, 603 N.Y.S.2d 736 (App. Div.), aff'd, 624 N.E.2d
689 (N.Y. 1993). But see Thorsted v. Gregoire, 841 F. Supp. 1068,
1081-82 (W.D. Wash. 1994) (term limits on congressional service
violate First and Fourteenth Amendments), aff'd on other grounds,
75 F.3d 454 (9th Cir. 1996). For a discussion of the analysis of
term limits in Eu, see the Court's previous published opinion on
this case, Bates, 904 F. Supp. at 1093-95.

1 instead of the citizen representatives envisioned by the
2 Founding Fathers. These career politicians become
3 representatives of the bureaucracy, rather than of the
4 people whom they are elected to represent.

5 To restore a free and democratic system of fair
6 elections, and to encourage qualified candidates to seek
7 public office, the people find and declare that the
8 powers of incumbency must be limited. Retirement
9 benefits must be restricted, state-financed incumbent
10 staff and support services limited, and limitations
11 placed upon the number of terms which may be served.

12 Cal. Const. art IV, § 1.5. Proposition 140 restricted retirement
13 benefits for legislators, reduced the legislature's budget, and
14 amended section 2(a) of article IV of the California Constitution
15 to limit senators to two four-year terms and Assembly members to
16 three two-year terms.⁷ It also imposed term limits on a variety of
17 other State offices. The present lawsuit does not challenge term
18 limits on non-legislative offices.

19 On November 6, 1990, California voters approved Proposition
20 140 by a margin of 52.17% to 47.83%. The degree of support for
21 Proposition 140 varied widely throughout the State. For example,
22 in Assembly District 12, Bates' district prior to the 1992
23 reapportionment, 62.9% of the voters opposed the measure. In
24 Assembly District 46, the district to which Friedman was originally
25 elected, 59.5% of the voters voted against Proposition 140. A
26 majority of the voters in thirty of California's eighty assembly
27 districts voted against the initiative. In other assembly

28 ⁷Section 2(a) reads in its entirety:

The Senate has a membership of 40 Senators elected for 4-year
terms, 20 to begin every 2 years. No Senator may serve more than 2
terms.

The Assembly has a membership of 80 members elected for 2-year
terms. No member of the Assembly may serve more than 3 terms.
(emphasized passages added by Proposition 140).

1 districts, of course, significant majorities supported term limits.
2 See Supplement to Statement of Vote November 1990, Tr. Ex. 44.

3 In 1991, the California legislature, a number of individual
4 members of the legislature, and some of their constituents
5 challenged the facial validity of Proposition 140 by filing a
6 petition for a writ of mandate in the California Supreme Court.
7 The California Supreme Court exercised its original jurisdiction
8 over the petition because of the great public importance of the
9 issues raised by the challenge. Eu, 54 Cal. 3d at 500. The
10 California Supreme Court evaluated the challenge to Proposition 140
11 on the basis of the briefs and other papers submitted by the
12 parties and amici curiae. No trial was conducted, and no lower
13 court examined the merits of the parties' legal or factual
14 contentions.

15 The California Supreme Court upheld most of the provisions of
16 Proposition 140, including legislative term limits. Id. at 501.
17 It also rejected the position advanced by the State Attorney
18 General on behalf of the Secretary of State of California that the
19 term limits provisions of Proposition 140 simply limited the number
20 of consecutive terms that legislators may serve. Id. at 503. It
21 instead held that Proposition 140 imposed a lifetime limit on
22 service in the legislature. Id. at 506.

23 The California Supreme Court's holding that Proposition 140's
24 lifetime legislative term limits provisions do not violate the
25 United States Constitution does not bind federal courts. See
26 Watson v. Estelle, 886 F.2d 1093, 1095 (9th Cir. 1989) (State
27 supreme court decisions construing federal Constitution do not bind
28

1 federal courts). However, its construction of the term limits
2 provisions of Proposition 140 does. See Arizonans for Official
3 English, 117 S. Ct. at 1074-75 (State supreme courts provide
4 definitive constructions of State laws). This Court, therefore,
5 may not narrowly interpret the term limits provisions of
6 Proposition 140 to avoid its constitutional difficulties.

7 D. The Parties

8 Between 1977 and 1996, Plaintiff Tom Bates represented the
9 area comprising the current 14th Assembly District. The precise
10 borders of his district have changed with each reapportionment, but
11 it has consistently included the city of Berkeley and adjoining
12 neighborhoods. The district has reelected Plaintiff Bates by wide
13 margins since the 1990 elections. In 1992, he received 85.41% of
14 the vote in the Democratic primary and 82.14% in the general
15 election. In 1994, he was unopposed in the primary and received
16 78.5% of the vote in the general election. Tr. Ex. 2. Pursuant to
17 Article IV, section 2(a) of the California Constitution, Bates was
18 not allowed to run in the November, 1996, election and may never
19 again run for the California Assembly. Bates may run for other
20 offices, including the State Senate, but he would prefer to serve
21 in the Assembly because he is already familiar with his assembly
22 district and with the workings of the Assembly itself. Tr. 171.

23 Bates testified that term limits are detrimental to the
24 ability of legislators to represent their constituents effectively.
25 According to Bates, it takes time for legislators to become
26 familiar with their own districts and to develop areas of
27 expertise. He believes that, as legislators gain expertise, their

1 dependence upon lobbyists and executive branch agencies diminishes.
2 Tr. 197-98. Legislators also become more skilled in navigating the
3 complexities of the legislative process. Coaxing bills through the
4 legislature can take years of education and coalition building.
5 Tr. 193, 211-12. Passage of legislation, however, is only the
6 first step in implementing the priorities of constituents. A
7 reluctant executive branch can thwart legislative enactments in a
8 variety ways, such as by providing inadequate funding. Tr. 172.
9 According to Bates, experienced legislators are more attuned to the
10 ways in which the executive can circumvent legislative intent and
11 are therefore more capable of ensuring that legislative enactments
12 are actually implemented. Finally, according to Bates, experienced
13 legislators who are likely to remain in the legislature for a
14 significant period of time carry greater clout in their dealings
15 with administrative agencies because the administrators realize
16 they will probably have to continue dealing with those legislators
17 in the future. Tr. 182. Term limits, Bates concluded, weaken the
18 legislature and impede the ability of the legislature to enact
19 reforms.

20 Plaintiffs Jonathan Browning, Lawrence Buchalter, Ardis
21 Graham, Richard Lewis, Edward Lyman, Rachel Sherman, and Richard
22 Sterling, voters in the 14th Assembly District, would have voted
23 for Bates in 1996 if he had been a candidate. The voter Plaintiffs
24 believe that Plaintiff Bates was an exceptional representative, who
25 served his constituents well and was unusually concerned with and
26 effective at representing the needs of low-income and disabled
27 citizens and protecting the environment. They do not believe that

1 other candidates would represent them as effectively and as well as
2 Bates. Some of the voter Plaintiffs testified that Bates'
3 legislative experience was an important reason for their support
4 and that they tend to prefer candidates with legislative experience
5 over candidates without legislative experience. Tr. 159-60
6 (Buchalter); Tr. 132 (Lyman).

7 Plaintiff Martha Escutia was first elected to represent the
8 50th Assembly District in Los Angeles in 1992. She received 46.81%
9 of the vote in the 1992 Democratic primary and 75.04% in the
10 general election. In 1994, she was unopposed in the primary and
11 received 74.65% of the vote in the general election. She was
12 unopposed again in the 1996 primary and was reelected to her third
13 term in the general election. Tr. Ex. 25. In the absence of term
14 limits, she probably would have run for either the Assembly or the
15 Senate in 1998. Term limits prevent her from running for
16 reelection to the Assembly, although not from running for election
17 to the Senate.

18 At trial, she testified that during her first term she spent
19 much of her time learning the legislative process. From her
20 observation, legislators serving their final term became less
21 effective because people dealing with them knew that they would
22 soon be gone. She therefore fears that term limits will strengthen
23 lobbyists and the executive branch at the expense of the
24 legislature. Tr. 465-66. She also believes that term limits
25 impede the formation of experienced minority leadership. Tr. 483.

26 Plaintiffs Sylvia Hernandez, Claudia Navar, and Ana Rosa Pena
27 are voters in the 50th District who have voted for Escutia in the

1 past, planned to vote for her in 1996, and would like to have the
2 opportunity to vote to reelect her to the Assembly in 1998.

3 Plaintiff Hernandez testified that she supports Escutia not only
4 because of her stances on important political issues such as
5 immigration, but also because of personal characteristics such as
6 determination, commitment, and her approach to problem solving.

7 Tr. 271. Hernandez believes that Escutia has become a more
8 effective legislator over time. Tr. 274.

9 Plaintiff Barbara Friedman was elected to represent the 46th
10 Assembly District in Los Angeles County at a special election on
11 July 30, 1991. Since reapportionment, she has represented the 40th
12 Assembly District, also in Los Angeles County. She received 15.99%
13 of the vote in the 1991 special primary election and 72.54% in the
14 special run-off election. She received 71.26% of the vote in the
15 1992 Democratic primary and 57.83% in the general election. In
16 1994, she was unopposed in the Democratic primary and garnered
17 57.92% of the vote in the general election. Tr. Ex. 28. Term
18 limits prevented her from running for reelection in 1996.

19 Friedman opposes term limits because they do not take into
20 account the time it takes to master the legislative process, to
21 become familiar with one's assembly district, and to train staff.
22 Tr. 29-32. She believes that term limits will weaken the
23 legislature's institutional memory and its ability to attract and
24 retain skilled staff members. Tr. 33, 36.

25 Plaintiffs Harriet Brown Sculley and Susan Zarakov live in the
26 40th Assembly District, have voted for Friedman in the past, and
27 would have liked to vote for her in 1996. Plaintiff Sculley

1 testified that she supports Friedman not only because of her
2 political positions, but also because she likes Friedman's style,
3 responsiveness, and accessibility. Tr. 9-10. She believes that
4 Friedman became a more effective representative in Sacramento the
5 longer she served there. It was important for Sculley that
6 Friedman represented her in the Assembly rather than at some other
7 level of government because Assembly members can more easily
8 represent community interests than, for example, State senators.
9 Finally, Sculley testified that she prefers to vote for candidates
10 with legislative experience rather than for inexperienced
11 candidates. Tr. 15.

12 ANALYSIS

13 I. The Legal Standard

14 The parties agree that the test set forth in Anderson v.
15 Celebrezze, 460 U.S. 780 (1983), and explained in Burdick v.
16 Takushi, 504 U.S. 428 (1992), is the proper standard to apply. The
17 Anderson-Burdick test evolved as the Supreme Court has considered
18 the significance to assign to the First and Fourteenth Amendment
19 rights implicated in "ballot access" cases, that is, challenges to
20 laws governing the procedures and eligibility requirements for
21 political parties or candidates to appear on ballots. See, e.g.,
22 Burdick, 504 U.S. 428 (upholding State's refusal to allow write-in
23 votes); Norman v. Reed, 502 U.S. 279 (1992) (striking down
24 requirement that small political parties gather large number of
25 signatures to appear on ballot for certain local elections); Munro
26 v. Socialist Workers Party, 479 U.S. 189 (1986) (upholding
27 requirement that third party candidates receive 1% of primary vote
28

1 in order to appear on general election ballot); Anderson, 460 U.S.
2 780 (striking down early filing deadline for third party
3 candidates).

4 When determining the constitutionality of candidate
5 eligibility requirements, a court

6 must first consider the character and magnitude of the
7 asserted injury to the rights protected by the First and
8 Fourteenth Amendments that the plaintiff seeks to vindicate.
9 It then must identify and evaluate the precise interests put
10 forward by the State as justifications for the burden imposed
11 by its rule. In passing judgment, the Court must not only
12 determine the legitimacy and strength of each of those
13 interests, it also must consider the extent to which those
14 interests make it necessary to burden the plaintiff's rights.
15 Only after weighing all these factors is the reviewing court
16 in a position to decide whether the challenged provision is
17 unconstitutional.

18 Anderson, 460 U.S. at 789. Burdick explained that,

19 the rigorousness of our inquiry into the propriety of a state
20 election law depends upon the extent to which a challenged
21 regulation burdens First and Fourteenth Amendment rights.
22 Thus, as we have recognized when those rights are subjected to
23 'severe' restrictions, the regulation must be 'narrowly drawn
24 to advance a state interest of compelling importance.' But
25 when a state election law provision imposes only 'reasonable,
26 nondiscriminatory restrictions' upon the First and Fourteenth
27 Amendment rights of voters, 'the State's important regulatory
28 interests are generally sufficient to justify' the
restrictions.

504 U.S. at 434 (quoting Norman, 502 U.S. at 289, and Anderson, 460
U.S. at 788).

The test is thus hybrid. If the Court finds that California's
version of legislative term limits imposes severe restrictions on
Plaintiffs' First and Fourteenth Amendment rights, it must apply
strict scrutiny. If the Court finds that the restrictions are not
severe, it must balance the rights asserted by Plaintiffs against
the precise interests advanced by the State to justify the burdens

1 imposed on Plaintiffs' rights. When evaluating the State's
2 interests, the Court must consider the extent to which those
3 interests require the State to burden Plaintiffs' rights.
4 Important regulatory interests of the State, however, are generally
5 sufficient to justify "reasonable, nondiscriminatory restrictions."

6 Interests that the Supreme Court has held are sufficient to
7 justify reasonable, nondiscriminatory restrictions on ballot access
8 are usually related to the State's interest in conducting organized
9 and fair elections. Thus, the Supreme Court has upheld
10 requirements that new political parties or independent candidates
11 demonstrate a modicum of popular support before being listed on
12 ballots. Munro v. Socialist Workers Party, 479 U.S. 189 (1986).
13 Similarly, restrictions on the ability of losing primary candidates
14 to run in general elections have been approved. Storer v. Brown,
15 415 U.S. 724 (1974). The Court has struck down requirements that
16 it believes prevent the expression of dissenting or minority
17 political viewpoints. See, e.g., Norman, 502 U.S. 279 (burdensome
18 signature-gathering requirement for political parties); Anderson,
19 460 U.S. 780 (early filing requirement for third-party or
20 independent candidates); Lubin v. Panish, 415 U.S. 709 (1974)
21 (large candidate filing fees when imposed on low-income
22 candidates).

23 As noted, the Anderson-Burdick test has evolved in ballot
24 access cases. California's version of term limits, however, does
25 not merely limit access to the ballot, it defines one of the
26 qualifications for holding legislative office. See U.S. Term
27 Limits, 115 S. Ct. at 1870 (cases in which Supreme Court has upheld

1 ballot access restrictions on congressional candidates have not
2 imposed substantive qualifications rendering a class of potential
3 candidates ineligible). By preventing a class of potential
4 candidates from running for legislative office and by denying
5 voters the opportunity to vote for a class of potential candidates,
6 term limits implicate First and Fourteenth Amendment rights at
7 least as much as most ballot access provisions have. It would
8 certainly be inappropriate to apply a more deferential test, such
9 as rational basis review, to this case.

10 II. Application of the Anderson-Burdick Test to Term Limits

11 A. Individual Rights Implicated by Term Limits

12 The Supreme Court has repeatedly observed that laws defining
13 the eligibility of candidates to appear on the ballot implicate the
14 constitutional rights of both candidates and voters. In Anderson,
15 for example, the Court observed,

16 'the rights of voters and the rights of candidates do not lend
17 themselves to neat separation; laws that affect candidates
18 always have at least some theoretical, correlative effect on
19 voters.' Our primary concern is with the tendency of ballot
20 access restrictions 'to limit the field of candidates from
which voters might choose.' Therefore, '[i]n approaching
candidate restrictions, it is essential to examine in a
realistic light the extent and nature of their impact on
voters.'

21 Anderson, 460 U.S. at 786 (quoting Bullock v. Carter, 405 U.S. 134,
22 143 (1972)). See also Burdick, 504 U.S. at 438; Lubin, 415 U.S. at
23 716; Williams v. Rhodes, 393 U.S. 23, 30-31 (1968); Davies v.
24 Grossmont Union High Sch. Dist., 930 F.2d 1390, 1397 (9th Cir.
25 1990) ("the individual's right to seek public office is
26 inextricably intertwined with the public's fundamental right to
27 vote"), cert. denied, 501 U.S. 1252 (1991); Erum v. Cavetano, 881

1 E:2d 689, 691 (9th Cir. 1989).

2 The cases on which the Anderson Court relied identified voting
3 and associational rights as the rights most directly implicated by
4 candidate eligibility requirements. 460 U.S. at 786-87 n.7 (citing
5 Williams v. Rhodes, 393 U.S. 23 (1968); Bullock v. Carter, 405 U.S.
6 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Illinois
7 Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979)).
8 See also Burdick, 504 U.S. at 438 (ballot access restrictions
9 affect voting rights); Munro, 479 U.S. at 193 (restrictions on
10 access of political parties to ballot impinge upon rights to
11 associate and vote).

12 1. Voting Rights

13 "[V]oting is of the most fundamental significance under our
14 constitutional structure." Burdick, 504 U.S. at 433 (quoting
15 Illinois State Bd. of Elections, 440 U.S. at 184). Indeed, "no
16 right is more precious in a free country than that of having a
17 voice in the election of those who make the laws under which . . .
18 we must live." Id. at 441 (quoting Wesberry v. Sanders, 376 U.S.
19 1, 17 (1964)). The Fourteenth Amendment "confers the substantive
20 right to participate on an equal basis with other qualified voters
21 whenever the State has adopted an electoral process for determining
22 who will represent any segment of the State's population." Lubin,
23 415 U.S. at 713 (quoting San Antonio Indep. Sch. Dist. v.
24 Rodriguez, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)).
25 When announcing that seats in State legislatures must be
26 apportioned on the basis of population, the Supreme Court declared,
27 "The right to vote freely for the candidate of one's choice is of

1 the essence of a democratic society, and any restrictions on that
2 right strike at the heart of representative government." Reynolds
3 v. Sims, 377 U.S. 533, 555 (1964). The Court explained that,

4 representative government is in essence self-government
5 through the medium of elected representatives of the people,
6 and each and every citizen has an inalienable right to full
7 and effective participation in the political processes of his
8 State's legislative bodies. . . . Full and effective
9 participation by all citizens in state government requires,
10 therefore, that each citizen have an equally effective voice
11 in the election of members of his state legislature.

12 Id. at 565.

13 California's term limits provisions deny voters the
14 opportunity to support experienced legislators. Term limits thus
15 provide voters who prefer candidates who are not "career
16 politicians" a structural advantage over those who support a
17 particular experienced legislator or who prefer candidates with
18 legislative experience in general. By denying some, but not all,
19 voters the ability to vote for the candidates of their choice, term
20 limits directly affect Plaintiffs' voting rights and their ability
21 to participate on an equal basis in self-government.

22 Term limits thus burden Plaintiffs' Fourteenth Amendment right
23 to participate on an equal basis with other voters in the election
24 of their representatives. Term limits also burden Plaintiffs'
25 First Amendment right of freedom of expression by imposing a
26 content-based restriction on which candidates voters may vote for.
27 The Supreme Court has held that States may impose reasonable,
28 politically neutral restrictions on expressive activity at the
polls. Burdick, 504 U.S. at 438. Term limits, however, are not
politically neutral. They are a determination by the majority that

1 one trait, legislative experience, is undesirable and that all
2 voters should be prohibited from voting for candidates possessing
3 that trait. A significant minority of voters are therefore
4 absolutely precluded from expressing their political preference for
5 experienced legislators when voting for their State
6 representatives.

7 The Supreme Court has recently explained that congressional
8 term limits are inconsistent with the ideal that the electorate
9 should be able to choose its own representatives. In U.S. Term
10 Limits, the Court observed that the imposition of term limits on
11 Congress "would violate that 'fundamental principle of our
12 representative democracy . . . that the people should choose whom
13 they please to govern them.'" 115 S. Ct. at 1850, 1862 (quoting
14 Powell v. McCormack, 395 U.S. 486, 547 (1969)). The Court quoted
15 Robert Livingstone, who declared during the Constitutional
16 Convention that, "The people are the best judges who ought to
17 represent them. To dictate and control them, to tell them whom
18 they shall not elect, is to abridge their natural rights." Id. at
19 1851 (quoting 2 Elliot's Debates 292-93).

20 Although U.S. Term Limits is not controlling authority on the
21 constitutionality of term limits for State legislatures, it does
22 demonstrate how term limits impede Plaintiffs' abilities to have a
23 voice in the selection of their representatives. By limiting
24 Plaintiffs' ability to vote for their preferred candidates, the
25 State is encroaching upon a fundamental principle of representative
26
27
28

1 democracy.⁸ Proposition 140 therefore burdens Plaintiffs' right to
2 vote for the candidates of their choice and the right of "each
3 citizen [to] have an equally effective voice in the election of
4 members of his state legislature." Reynolds, 377 U.S. at 565.

5 2. Right to Vote for Particular Candidate

6 The State concedes that its term limits provisions prevent
7 citizens from voting for particular candidates. It seeks to
8 minimize the significance of this restriction by arguing that
9 voters do not enjoy a fundamental right to vote for the particular
10 candidate of their choice. This observation is correct in the
11 sense that ballot access provisions are not automatically subject
12 to strict scrutiny simply because they exclude candidates who do
13 not comply with their requirements. In Burdick, for example, the
14 Supreme Court upheld Hawaii's prohibition on write-in voting. 504
15 U.S. at 441. By denying voters the ability to cast write-in
16 ballots, Hawaii prevented voters from voting for candidates who had
17 not complied with Hawaii's elections procedures. The Court upheld
18 Hawaii's ban on write-in voting because Hawaii provided aspiring
19 candidates a variety of other means of gaining access to the
20 ballot. Id. Thus, voters can be denied the opportunity to vote
21 for a particular candidate, provided that constitutionally adequate
22 alternative means for appearing on the ballot were available to
23

24 ⁸That term limits were imposed by popular initiative rather
25 than by the legislature does not protect them from judicial review.
26 Popular initiatives are held to the same constitutional standards
27 as other legislation. A majority of voters may not deprive
individuals of constitutional rights, just as the legislature may
not. See U.S. Term Limits, 115 S. Ct. at 1858 n.19; Lucas v.
Forty-Fourth General Assembly, 377 U.S. 713, 736 (1964).

1 that candidate.

2 California's version of term limits, however, does not simply
3 create a procedural hurdle or impose a temporary restriction. It
4 permanently denies voters the opportunity to vote for particular
5 candidates as well as for any candidates with extensive experience
6 as a State legislator. The State's argument that the voter
7 Plaintiffs do not have a fundamental right to vote for a particular
8 candidate at a particular election is therefore not dispositive of
9 Plaintiffs' challenge to the constitutionality of lifetime
10 legislative term limits.

11 3. Freedom of Association

12 The right of voters "to cast their votes effectively" overlaps
13 with "the right of individuals to associate for the advancement of
14 political beliefs." Williams, 393 U.S. at 30. Although term
15 limits do not directly prohibit individuals from associating for
16 the advancement of common beliefs, they do limit the ability of
17 individuals to take advantage of the galvanizing effects of
18 elections on political organization. The exclusion of candidates
19 from the ballot "burdens voters' freedom of association . . .
20 because an election campaign is an effective platform for the
21 expression of views on the issues of the day, and a candidate
22 serves as a rallying point for like-minded citizens." Anderson,
23 460 U.S. at 787-88. See also Eu v. San Francisco County Democratic
24 Cent. Comm., 489 U.S. 214, 222-25 (1989).

25 Term limits restrict Plaintiffs' freedom to associate because
26 candidates who have been effective rallying points for political
27 activity in the past are excluded from running for re-election.

1 The voter Plaintiffs are thus denied the opportunity to rally
2 political support behind their favored candidate for a particular
3 office precisely because their favored candidate has been
4 repeatedly successful in the past. Term limits therefore burden
5 Plaintiffs' freedom of association by denying them the opportunity
6 to use the device of a political campaign on behalf of their
7 favored candidate to promote their political goals.

8 4. The Right to Run for a Particular Office

9 The State also contends that individuals do not have a
10 fundamental right to run as candidates for particular offices. See
11 Clements v. Fashing, 457 U.S. 957, 963 (1982) (plurality opinion);
12 Stiles v. Blunt, 912 F.2d 260, 265 (8th Cir. 1990), cert. denied,
13 499 U.S. 919 (1991); Plante v. Gonzalez, 575 F.2d 1119, 1126 (5th
14 Cir. 1978), cert. denied, 439 U.S. 1129 (1979). As explained
15 above, however, the right of a candidate to run for office is
16 intertwined with the voting and associational rights of the
17 electorate. The availability of political opportunity to
18 particular candidates affects a broader range of interests than
19 potential candidates' interests in seeking office. "[V]oters can
20 assert their political preferences only through candidates or
21 political parties. . . . The right of a party or an individual to a
22 place on the ballot is entitled to protection and is intertwined
23 with the rights of voters". Lubin, 415 U.S. at 716. See also
24 Burdick, 504 U.S. at 438.

25 The interest of Plaintiffs Bates, Escutia, and Friedman in
26 running for the Assembly therefore merits protection because their
27 interest in running for office necessarily implicates the voter

1 Plaintiffs' voting and associational rights.

2 B. Severity of the Burden Imposed by Term Limits

3 Proposition 140 thus burdens Plaintiffs' fundamental rights to
4 vote on an equal basis with others and to associate for the
5 advancement of their political views. That term limits burden
6 fundamental rights, however, does not end the Court's inquiry. The
7 Court must also determine the severity of the burden that term
8 limits impose on these rights.

9 The Supreme Court has not articulated a test for determining
10 when a burden is severe. By referring to "reasonable,
11 nondiscriminatory restrictions," Anderson and Burdick hinted at
12 some possible criteria for determining the severity of the burden,
13 but the terms "reasonable" and "nondiscriminatory" are not self-
14 defining.

15 One year before Anderson, the Supreme Court upheld a Texas
16 provision which prohibited justices of the peace from running for
17 the legislature if they would have to cut short their service as
18 justices of the peace in order to serve in the legislature.
19 Clements v. Fashing, 457 U.S. 957, 968 (1982). The Court
20 determined that this limitation did not significantly limit ballot
21 access because it imposed, at most, a two-year waiting period on
22 justices of the peace who desired to run for the legislature. Id.
23 at 967-68.

24 Unlike the restriction at issue in Clements, Proposition 140
25 imposes a lifetime ban on term-limited legislators from being
26 elected to the legislature. The holding of the Supreme Court in
27 Clements, which found that a brief waiting period does not

1 constitute a significant barrier to candidacy, is not inconsistent
2 with a finding that lifetime term limits impose a serious burden on
3 Plaintiffs' constitutional rights. Indeed, Clements, by
4 emphasizing the short-term nature of the restriction imposed on
5 Texas justices of the peace, lends support to a finding that
6 permanently excluding a class of candidates from the ballot imposes
7 a serious burden on candidates' and voters' rights.⁹

8 The district court evaluating the constitutionality of Maine's
9 limit on consecutive terms of legislative service offered a related
10 approach for evaluating the severity of the burden imposed by term
11 limits. It observed that there are "two key indicators of when a
12 restriction moves from legitimate to severe: whether the
13 restriction is content based or content neutral, and the extent to
14 which the alternative routes to ballot access minimize the
15 restriction on the plaintiff's rights." League of Women Voters v.
16 Diamond, 923 F. Supp. 266, 269 (D. Me. 1996) (denying preliminary
17 injunction), aff'd, 82 F.3d 546 (1st Cir. 1996). The court
18 concluded that consecutive term limits impose a burden that is
19 "clearly not de minimis" but that is also not sufficient to require
20 strict scrutiny. Id. at 270.

21
22 'A plurality of the Court in Clements argued that the Court
23 should focus on whether ballot access provisions exclude "certain
24 classes of candidates from the electoral process." Id. at 964.
25 The plurality would apply heightened scrutiny when a ballot access
26 provision was based on wealth or imposed burdens on small political
27 parties or independent candidates. Otherwise, the plurality urged
the Court to apply heightened scrutiny only after examining the
extent of the burden imposed by the restriction on candidacy. Id.
at 966. The test articulated more recently by a majority of the
Court is less concerned with the particular classification used
than with the "extent and nature" of the impact of ballot access
provisions on voters. Anderson, 460 U.S. at 786.

1 The court justified its conclusion on two grounds. First, it
2 argued that term limits "cannot fairly be characterized as content
3 based" because such provisions do not "distinguish between or
4 select among the range of ideas and political discourse from which
5 voters can choose." Id.

6 A number of other courts have also emphasized the content
7 neutrality of term limits when finding that they do not impose a
8 severe burden on voters' rights. Eu, 54 Cal. 3d at 519; Roth, 603
9 N.Y.S.2d at 971.

10 Term limits are content neutral in the sense that they do not
11 target candidates on the basis of the views they espouse.¹⁰ They
12 are not content neutral in another, important sense. Proposition
13 140 targets legislators with legislative experience. In 1990,
14 approximately 47.83% of the California electorate, and a majority
15 voters in thirty of California's eighty assembly districts, voted
16 against the strict version of term limits imposed by Proposition
17 140. A portion of the vote against Proposition 140 was cast by
18 voters who desired to retain the ability to vote for experienced
19 candidates.¹¹ Proposition 140 prevents this minority from voting
20

21 ¹⁰However, some of the ballot access provisions that the
22 Supreme Court has struck down were content neutral in this sense,
23 too. Early filing deadlines or high filing fees do not explicitly
24 target candidates on the basis of the message they espouse. The
25 Supreme Court has found, however, that they are likely to impose
burdens on the ability of some voters to express their preferences
in the electoral process. See Anderson, 460 U.S. 780 (striking
down early filing deadline); Bullock v. Carter, 405 U.S. 134 (1972)
(striking down high filing fees).

26 ¹¹It is difficult and unnecessary to determine precisely what
27 portion of the electorate opposed term limits entirely. Another
initiative on the November, 1990, ballot was Proposition 131, which
28

1 for candidates possessing a desired characteristic simply because
2 those candidates possess that characteristic. That characteristic,
3 legislative experience, distinguishes conflicting political views
4 about the best forms of political representation. Term limits skew
5 the electoral process by preventing a significant minority from at
6 least voting for, if not electing, candidates who embody a
7 particular view of political representation that is opposed by the
8 majority. Term limits thus impose a content-based restriction on
9 the ability of voters to vote for the candidates of their choice.
10 See Thorsted v. Gregoire, 841 F. Supp. 1068, 1082 (W.D. Wash.
11 1994), aff'd on other grounds, 75 F.3d 454 (9th Cir. 1996).

12 League of Women Voters also stressed that Maine's limit on
13 consecutive terms does not completely foreclose ballot access to
14 incumbents. 923 F. Supp. at 270.¹² Term-limited legislators could
15 sit out one or more terms and then run again, or they could run for
16 a different office. Id. Proposition 140, in contrast, imposes a
17 lifetime limit of three terms in the Assembly and two terms in the

18
19 would have instituted public campaign financing and limited
20 Senators to three consecutive terms and Assembly members to six
21 consecutive terms. Proposition 131 received only 37.75% of the
22 vote. Tr. Ex. 50. No evidence was submitted to indicate how many
23 voters supported the version of term limits in Proposition 131 but
24 not the more extreme version in Proposition 140. Because
25 Proposition 131 would not have imposed a lifetime limit on
26 legislative service and provided for longer periods of
27 uninterrupted service than Proposition 140, it would not have
28 imposed the same kind of restriction on the ability of voters to
vote for experienced candidates.

¹²At least two other cases in which term limits were upheld
also involved limits on consecutive service. Miyazawa v. City of
Cincinnati, 825 F. Supp. 816, 817 (S.D. Ohio 1993), aff'd on other
grounds, 45 F.3d 126 (6th Cir. 1995); Roth v. Cuevas, 603 N.Y.S.2d
962 (Sup. Ct.), aff'd, 603 N.Y.S.2d 736 (App. Div.), aff'd, 624
N.E.2d 689 (N.Y. 1993).

1 Senate. Eu, 54 Cal. 3d at 506. Although term-limited Assembly
2 members may run for other offices, they are absolutely precluded
3 from running for the Assembly. Proposition 140 thus imposes a
4 significantly greater burden on voters' and candidates' rights than
5 the burden imposed by Maine's limit on consecutive terms, which
6 itself was "clearly not de minimis."

7 Proposition 140 prevents Plaintiffs from expressing their
8 political preference for candidates with legislative experience.
9 Term limits therefore restrict the ability of certain voters to
10 participate in the electoral process on an equal basis with other
11 voters because of their political preferences for a particular
12 category of candidates or for an individual candidate. In
13 addition, unlike the majority of States that have imposed term
14 limits on State legislators, California's version of term limits
15 imposes a lifetime limit on legislative service. California voters
16 who value legislative experience or a particular candidate are not
17 simply required to defer expressing their preference, they are
18 forever prevented from expressing their preference at the ballot
19 box. See also U.S. Term Limits, 115 S. Ct. at 1870 (congressional
20 term limits disadvantage particular class of candidates);
21 Thorsted, 841 F. Supp. at 1082 (congressional term limits not
22 neutral or nondiscriminatory because they determine outcome, not
23 procedures, of election).

24 Because lifetime legislative term limits impose a content-
25 based restriction on the eligibility of candidates for legislative
26 office and because they permanently restrict Plaintiffs' ability to
27 vote for their preferred candidates, the Court finds that the

1 legislative term limits provisions of the California Constitution
2 impose a severe burden on Plaintiffs' First and Fourteenth
3 Amendment rights of voting, expression, and association.

4 C. Importance of the State's Interests in Term Limits

5 After considering "the character and magnitude of the asserted
6 injury to the rights protected by the First and Fourteenth
7 Amendments that the plaintiff seeks to vindicate," the Court must
8 "identify and evaluate the precise interests put forward by the
9 State as justifications for the burden imposed by the rule."

10 Anderson, 460 U.S. at 789. The Court must also "consider the
11 extent to which those interests make it necessary to burden
12 [Plaintiffs'] rights." Id. The State has identified two general
13 categories of interests that are served by term limits. First, it
14 argues that States have a sovereign right to restructure their
15 political processes and to define the qualifications for important
16 State offices. Second, it contends that term limits advance a
17 variety of interests related to enhancing political accountability
18 and representation.

19 1. State Sovereignty

20 a. Gregory v. Ashcroft and the Political Function
21 Cases

22 The State argues that the Tenth Amendment and principles of
23 federalism protect its prerogative to determine the structure of
24 government and the qualifications of its officers. The principal
25 case on which the State relies is Gregory v. Ashcroft, 501 U.S. 452
26 (1991). In Gregory, the petitioners challenged the legality of a
27 provision of the Missouri Constitution requiring State judges to

1 retire upon reaching the age of seventy. They argued that the
2 mandatory retirement provision violated the Age Discrimination in
3 Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and the Equal
4 Protection Clause. The Supreme Court, noting the importance of a
5 State's ability to prescribe the qualifications for holding State
6 offices, crafted a "plain statement" rule. Under this rule, the
7 Court would not construe federal employment laws to apply to
8 important State offices absent an unambiguous statement of
9 statutory intent. Gregory, 501 U.S. at 468-70. The Court held
10 that the ADEA does not unambiguously apply to State judges;
11 therefore, mandatory retirement provisions for State judges do not
12 violate the ADEA. Id. at 470. Significantly, the Court did not
13 hold that Congress could not pass legislation governing
14 qualifications for holding important State offices. It simply held
15 that, in the case of the ADEA, Congress had not legislated the
16 retirement age of State judges.¹³

17 While discussing the significance of a State's ability to
18 define the qualifications for holding important State offices, the
19 Supreme Court observed that,

20 Through the structure of its government, and the character of
21 those who exercise government authority, a State defines
22 itself as a sovereign. 'It is obviously essential to the
23 independence of the States, and to their peace and
24 tranquility, that their power to prescribe the qualifications
25 of their own officers . . . should be exclusive, and free from
26 external interference, except so far as plainly provided by
27 the Constitution of the United States.'

28 ¹³The Court also reiterated that age is not a suspect
classification. Applying rational basis review, it held that the
mandatory retirement provision did not violate the Equal Protection
Clause. Id. at 473.

1 Id. at 460 (quoting Taylor v. Beckham, 178 U.S. 548, 570-71
2 (1900)). See also Rodriguez v. Popular Democratic Party, 457 U.S.
3 1, 8 (1982) ("The methods by which the people of Puerto Rico and
4 their representatives have chosen to structure the Commonwealth's
5 electoral system are entitled to substantial deference.").
6 Although Gregory noted that the federal Constitution does place
7 some limits on the power of State governments to define the
8 qualifications for State office, it also pointed out that the
9 "Court has never held that the [Fourteenth] Amendment may be
10 applied in complete disregard for a State's constitutional powers.
11 Rather, the Court has recognized that the States' power to define
12 the qualifications of their officeholders has force even as against
13 the proscriptions of the Fourteenth Amendment." Id. at 469.

14 Gregory identified the "political function" cases as examples
15 of Fourteenth Amendment cases in which the Supreme Court
16 deferentially reviewed States' power to define the qualifications
17 for holding State office. These cases provide that laws excluding
18 non-citizens from important governmental positions are subject to
19 less rigorous scrutiny than laws that make classifications on the
20 basis of alienage usually receive. Id. at 463 (citing Bernal v.
21 Fainter, 467 U.S. 216, 220 (1984)). In Sugarman v. Dougall, the
22 Court declined to apply strict scrutiny to laws prohibiting non-
23 citizens from holding offices that serve a political function
24 because of the States' interest in preserving "the basic
25 conception of a political community." 413 U.S. 634, 647 (1973)
26 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)). Because the
27 Court viewed non-citizens as falling outside the political

1 community, States were justified in excluding non-citizens from
2 positions intimately related to the life of the political
3 community.

4 The political function cases upon which the Gregory Court
5 relied for its observation are of little relevance to term limits.
6 The Supreme Court's analysis in the political function cases turned
7 on the ability of communities to restrict certain politically
8 sensitive jobs to members of the political community. Term limits,
9 in contrast, burden the ability of voters and candidates, the
10 defining elements of the political community, to participate on an
11 equal basis in the electoral process.

12 Gregory does establish that States have a substantial interest
13 in defining the qualifications for important State offices, but it
14 is not dispositive in the context of term limits. Gregory observed
15 that federalism sometimes limits the force of the Fourteenth
16 Amendment, but, with the exception of the political function cases,
17 it did not specify when federalism concerns override normal
18 Fourteenth Amendment standards. Indeed, the Supreme Court has
19 recently clarified that Gregory does not stand for the proposition
20 that States may disregard basic constitutional protections when
21 establishing the conditions of candidacy for State office.
22 Chandler v. Miller, No. 96-126, 1997 WL 176382, at *8 (S. Ct. Apr.
23 16, 1997). Term limits implicate not only the Fourteenth
24 Amendment, but also the First Amendment. Gregory, however, did not
25 suggest that federalism concerns can override the strictures of the
26 First Amendment. See Chandler, 1997 WL 176382, at *8 (State's
27 power to establish qualifications for State offices does not

1 diminish the constraints on State action imposed by the Fourth
2 Amendment). Finally, as explained below, the Supreme Court has
3 been especially rigorous in its application of the Fourteenth
4 Amendment when the right to vote is at stake. Gregory did not
5 involve voting rights.

6 b. Voting Rights Cases

7 The voting rights cases establish that the Fourteenth
8 Amendment limits States' leeway in determining the basis for
9 political representation. In Baker v. Carr, the Supreme Court held
10 that the manner in which a State apportions legislative
11 representation presents a justiciable controversy. 369 U.S. 186,
12 232 (1962). The Court observed that "the presence of a matter
13 affecting State government does not render the case
14 nonjusticiable." Id. In subsequent decisions, the Court held that
15 State legislatures must be elected according to the principle of
16 one person, one vote. See, e.g., Reynolds, 377 U.S. at 568; Lucas
17 v. Forty-Fourth General Assembly, 377 U.S. 713, 736 (1964).

18 These decisions struck at the heart of States' ability to
19 decide how to structure their electoral systems. See Baker, 369
20 U.S. at 334 (Harlan, J., dissenting). Moreover, the decisions held
21 State governments to a different standard than the federal
22 government. State senate districts, for example, were required to
23 be determined on the basis of population, not political
24 subdivision. Reynolds, 377 U.S. at 568. The Court explicitly
25 rejected the argument that counties could serve as the basis for
26 representation in State senates just as States are the basis for
27 representation in the United States Senate. Id. at 573-75. The

1 Court also rejected systems for the election of Statewide officers
2 that were explicitly patterned after the Electoral College. Gray
3 v. Sanders, 372 U.S. 368, 377-80 (1963).

4 The Fourteenth Amendment, then, was applied to overturn basic
5 structures integral to State government, structures that had been
6 in place for decades and that had direct federal analogies. The
7 Supreme Court justified its far-reaching actions by pointing to the
8 importance of providing all voters an equal basis for participating
9 in the electoral process. That term limits reflect a basic
10 decision by the State about what the character of the State
11 legislature should be, therefore, does not establish that those
12 decisions must necessarily survive constitutional review or that
13 they should be subject to a more deferential standard of review.
14 This is especially true given the manner in which term limits
15 restrict Plaintiffs' voting rights.

16 c. State Sovereignty and Narrow Tailoring

17 Anderson and Burdick instruct courts to consider whether the
18 means chosen by the State is narrowly tailored to accomplish the
19 State's asserted interest. Insofar as sovereignty consists of the
20 exercise of discretion, it is anomalous to ask whether a particular
21 means chosen by the State is narrowly tailored to serve the State's
22 interest in exercising its sovereignty. The State's sovereign
23 interest, however, cannot be sufficient by itself to establish the
24 constitutionality of political reforms. Otherwise, any political
25 decision by the State could escape constitutional scrutiny.
26 Because of the severity of the burden lifetime legislative term
27 limits impose on voters' First and Fourteenth Amendment rights, the

1 State must identify other interests that are advanced by term
2 limits. The State's sovereign interest in shaping its own
3 political institutions and defining the qualifications for holding
4 high political office, however, lends significance to the State's
5 other interests.

6 2. Political Accountability and Representation

7 The State asserts six interests related to enhancing political
8 accountability and representation: ending political careerism,
9 overcoming incumbent advantages, increasing electoral competition,
10 encouraging qualified candidates to run for office, and reinstating
11 rotation, a "central tenet of republican government." Many of
12 these interests, however, rest on the State's assumption that
13 legislators had become invulnerable to the normal means of insuring
14 political accountability during the 1980s.

15 a. Legislative Turnover

16 The State has not proven its factual assertions that
17 legislators attained unprecedented job security during the 1980s
18 and had become invulnerable and insensitive to less drastic
19 measures designed to insure political accountability. The State's
20 expert testified that the rate of turnover in the legislature
21 declined noticeably between the 1970s and 1980s. Tr. 553
22 (Petracca), Tr. Ex. 69. He attributed increased turnover during
23 the early 1990s to anticipation of the implementation of term
24 limits in 1996. Tr. 569. Plaintiffs' expert, however,
25 demonstrated that the relatively high turnover rates during the
26 1970s and the relatively low turnover rates during the 1980s were
27 part of a cyclical pattern in legislative turnover that has

1 prevailed since the end of the Second World War. Tr.345-50
2 (Jacobson), Tr. Exs. 32-38. It is thus inaccurate to describe the
3 1980s as a decade of unprecedented low rates of turnover.

4 The State also failed to establish that term limits were
5 necessary to break the pattern of low legislative turnover that
6 some perceived as emerging during the 1980s. Although legislative
7 turnover in California increased following the approval of
8 Proposition 140, turnover also increased in the United States House
9 of Representatives, which was not affected by term limits. Tr.
10 358-62 (Jacobson), Tr. Ex. 38. Plaintiffs attribute increased
11 turnover during the early 1990s in both the California legislature
12 and the House of Representatives to a variety of factors:
13 legislative reapportionment, a spate of scandals, and national
14 political trends. Tr. 359. A similar combination of influences
15 was also responsible for relatively high rates of turnover during
16 the 1970s. Tr. 352. Even assuming that low rates of legislative
17 turnover are undesirable and that turnover declined to an
18 unprecedented low during the 1980s, then, the State has failed to
19 establish that term limits were necessary to rectify the low
20 turnover rates of the 1980s.

21 b. The State's Interests

22 i. Political Careerism

23 The preamble to Proposition 140 declared political careerism
24 to be one of the problems afflicting California politics. Cal.
25 Const. art. IV, § 1.5. Legislative term limits do not prevent
26 people from making careers as politicians. They limit the amount
27 of time that individuals may serve in the legislature, but they do
28

1 not prevent legislators from running for other political offices,
2 nor do they prevent individuals who have spent a lifetime in other
3 political offices from running for the legislature.

4 Term limits do prevent individuals from pursuing careers as
5 State legislators, but the State has not established that its
6 interest in preventing people from pursuing careers in the
7 legislature is important enough to justify the burden that term
8 limits impose on voting rights. The State contends that
9 professional politicians become socialized in a culture of
10 government and therefore become distant from and unresponsive to
11 their constituents. Tr. 536 (Petracca). Non-professional
12 legislators, the State maintains, will introduce fresh ideas into
13 the legislative process, be less motivated by concerns for their
14 careers, and more responsive to constituents' concerns. Tr. 537.

15 Concern for their own careers, however, motivates those who
16 hope to pursue a legislative career to be responsive to
17 constituents. Re-election is a powerful incentive for legislators
18 to be attentive to constituents' needs and priorities. Tr. 82-83
19 (Fiorina); 342-44 (Jacobson). Voters have the ability to elect
20 someone else if their legislator ceases to represent their
21 interests or their views.

22 Term limits reflect an ideological preference for "citizen" or
23 amateur legislators. The State has a legitimate interest in
24 allowing voters to express their preference for amateur
25 legislators, but it does not have a legitimate interest in
26 preventing other voters from expressing their ideological
27
28

1 preference for career or professional legislators. See Buckley v.
2 Valeo, 424 U.S. 1, 48-49 (1976) ("the concept that government may
3 restrict the speech of some elements of our society in order to
4 enhance the relative voice of others is wholly foreign to the First
5 Amendment").

6 The State has therefore failed to establish that the pursuit
7 of legislative careers, by itself, impedes effective representation
8 or electoral competition. Ending legislative careerism, therefore,
9 is not a substantial or compelling State interest.

10 ii. Advantages of Incumbency

11 The strongest interest articulated by the State is the State's
12 interest in reducing the advantages that incumbents enjoy over
13 rival candidates simply because they are incumbents. Incumbency
14 confers a variety of advantages on legislators. Some of these
15 advantages are inherent in the position; others generally accompany
16 incumbency but can be restricted or eliminated. Some advantages
17 are the fair rewards of desirable behavior; others may be unfair
18 and undeserved.

19 Inherent advantages of incumbency include visibility, public
20 recognition, and gratitude for services rendered. Visibility and
21 recognition facilitate communications between legislators and their
22 constituents and permit the public to monitor their political
23 representatives. Tr. 71 (Fiorina). The gratitude that legislators
24 earn by representing the political interests of their constituents
25 is itself an important incentive for legislators to remain
26 attentive to voters. To the extent that term limits diminish the
27

1 value of visibility and gratitude, they may make legislators less
2 sensitive to the priorities of their constituents. Tr. 84. The
3 State has therefore failed to establish that it has a significant
4 interest in eliminating these inherent advantages of incumbency.

5 Other advantages of incumbency, however, are less desirable in
6 the legislative process. Among the most significant of these
7 advantages are fundraising ability, the perquisites of office, and
8 control over legislative redistricting. Tr. 73-75. The State does
9 have a compelling interest in limiting these advantages because
10 they hinder political accountability and discourage political
11 opposition.

12 Although term limits are one way to eliminate these
13 advantages, the State did not establish that other, less
14 constitutionally intrusive reforms, would be less effective than
15 term limits. Perquisites of office can be, and to an extent
16 already have been, restricted by initiative or by normal
17 legislation. Control over legislative redistricting can be
18 assigned to a nonpartisan body, as occurred following the 1990
19 census. Public financing of legislative campaigns could reduce the
20 significance of political fundraising.¹⁴

21
22
23 ¹⁴The State argues that public financing of campaigns is not a
24 realistic alternative to term limits and therefore does not
25 establish that term limits are an overbroad solution to incumbent
26 advantages. The California electorate's past refusal to adopt
27 reforms that are narrowly tailored to redress incumbent advantages
28 in fundraising, however, cannot shield term limits from
constitutional scrutiny. The State's argument is tantamount to
saying that popular but unconstitutional solutions to serious
problems should survive judicial scrutiny if narrowly tailored,
constitutional solutions to those problems are unpopular.

1 Even if the State had established that nothing short of a ban
2 on incumbents from seeking re-election could overcome the unfair
3 advantages of incumbency, it has not established that this ban must
4 be permanent. Some advantages of incumbency, such as the
5 perquisites of office, vanish as soon as an incumbent leaves
6 office. Others, such as recognition and gratitude, fade over time.
7 Professor Jacobson studied the success of former members of
8 Congress who ran for re-election after being out of office. Most
9 of these former congress members ran for re-election within four
10 years of leaving office. He found that former congress members are
11 no more likely to be elected than other candidates who have prior
12 political experience. Tr. 379.

13 Although the State does have a compelling interest in limiting
14 the undesirable advantages of incumbency, other reforms that do not
15 raise significant constitutional problems would also advance the
16 State's interest. Lifetime term limits, therefore, are not
17 narrowly tailored to accomplish the State's interest in diminishing
18 the undesirable advantages of incumbency.

19 iii. Electoral Competition

20 The State argues that term limits advance its interest in
21 promoting electoral competition. Incumbents generally do not face
22 serious challenges in primary elections and often escape serious
23 challenges in general elections as well. See Tr. Ex. 69. In
24 addition, larger numbers of candidates run for open seats than for
25 seats held by incumbents seeking re-election, and the margin of
26 victory in contests for open seats tends to be closer. Tr. 560-67
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1 (Petracca). Because term limits will periodically create open
2 seats, the State contends, more electoral competition will result.

3 As used by the State, the term electoral competition refers to
4 increasing the number of candidates running for office and
5 decreasing the margins by which candidates win elections. Neither
6 of these interests, by themselves, are compelling interests because
7 it is not self-evident that they have a desirable effect on
8 government. The State's argument is tantamount to saying that
9 electoral competition will be improved by eliminating the strongest
10 competitors from the field. The State argues, however, that
11 intensifying electoral competition is a compelling State interest
12 because it will have the effect of increasing the opportunity for
13 the electorate to make judgments about party platforms and
14 promoting clearly defined debate about public policy choices. Tr.
15 571-77.

16 By periodically preventing incumbents from running for re-
17 election, term limits may help focus debate on the political
18 stances of the candidates and their parties rather than on how well
19 the incumbent has represented the district. Although the State has
20 a legitimate interest in encouraging debate about public policy,
21 for the State to promote a favored form of political discourse by
22 preventing voters from voting for a disfavored category of
23 candidates raises serious First Amendment and voting rights
24 concerns. See Buckley, 424 U.S. at 48-49. The State, therefore,
25 cannot justify term limits on the grounds that they encourage
26 certain forms of political debate.

1 The State's argument overlooks one of the main purposes of
2 electoral competition: promoting electoral accountability. The
3 threat of electoral competition encourages incumbents to be
4 attentive to their constituents' needs and to represent their
5 interests vigorously. Tr. 82 (Fiorina). That incumbents often
6 face weak challengers in elections does not necessarily indicate
7 that they are unaccountable to their constituents. It may indicate
8 that they are forestalling serious opposition by representing their
9 districts in a manner their constituents support.

10 Indeed, term limits may undermine electoral accountability by
11 reducing incentives for legislators to represent their districts.
12 Tr. 84 (Fiorina); 384 (Jacobson). It takes a major investment of
13 time and effort to become familiar with a legislative district.
14 The possibility of re-election is a strong incentive for
15 legislators to make this investment. Term limits diminish the
16 incentive for undertaking this work because legislators can no
17 longer look forward to the possibility that their hard work will
18 yield political dividends in subsequent elections. Tr. 391-92
19 (Jacobson).

20 Even if the State had established that increasing the number
21 of candidates running for office and decreasing the margin by which
22 candidates win elections were compelling interests, it has not
23 established that lifetime term limits are narrowly tailored to
24 accomplishing these interests. Limiting the number of consecutive
25 terms that legislators may serve would also periodically create
26 open-seat elections.

1 The State, therefore, has failed to establish either that
2 increasing the number of candidates running for office and
3 decreasing the margin by which candidates win elections are
4 compelling interests or that lifetime term limits are narrowly
5 tailored to accomplishing these goals.

6 iv. Encouraging Qualified Candidates

7 The State also argues that term limits will encourage more and
8 better qualified candidates to run for legislative office. Because
9 term limits will create more open seats than otherwise would have
10 occurred, it is probably true that term limits will encourage more
11 people to run for the legislature. There is no evidence that those
12 candidates will be more qualified. It is incongruous to argue that
13 term limits will encourage better candidates to run for office
14 while at the same time preventing popular candidates from running
15 for re-election.

16 Although it is legitimate for the State to create conditions
17 that will encourage more individuals to run for legislative office,
18 for the State to encourage some candidates by forbidding others
19 from running raises serious First Amendment concerns. See Buckley,
20 424 U.S. at 48-49.

21 The encouragement that term limits provide to qualified
22 candidates who would not otherwise run for the legislature,
23 therefore, does not constitute a compelling State interest.
24 Neither is the lifetime ban narrowly tailored to achieve this
25 result.

26 ///

v. Representativeness of Legislature

The State also contends that term limits will make the legislature more representative. The State's expert, Professor Petracca, argued that term limits make the legislature more demographically and ideologically representative. Tr. 586.

The evidence is mixed concerning the effects of term limits on demographic representation within the legislature. Term limits probably will increase the number of women in the legislature in the short term. In elections for open seats to the legislature, male and female candidates fare equally well. Incumbents, however, enjoy an advantage over challengers. Because incumbents have been disproportionately male, it is logical to conclude that term limits will accelerate the rate at which women become legislators. Tr. 589 (Petracca); Tr. 395 (Jacobson). This will be a short-term phenomenon, however.

It is not clear that term limits will make the legislature more representative of other demographic groups. Legislative reapportionment has been the predominant factor behind the increasing representation of ethnic minorities. Tr. 394 (Jacobson). It is doubtful that term limits alone will produce more candidates from less affluent sectors of society. Tr. 393. Term limits may encourage more candidates with background in business, although this is disputed. Tr. 593 (Petracca); Tr. Ex. 69, table 14.

The effects of term limits on the demographic composition of the legislature, thus, are speculative. Speculation about the

1 possible effects of term limits cannot justify the severe burdens
2 imposed on the ability of voters to vote for candidates of their
3 choice. Even if the State's argument that term limits will make
4 the legislature more demographically representative were not
5 speculative, the State has not established that lifetime term
6 limits will be more effective at achieving this goal than limits on
7 consecutive terms.

8 The State also argued that term limits will make the
9 legislature more ideologically representative. Term limits will
10 accomplish this, according to the State, because political debate
11 will focus less on the incumbent's ability to provide constituent
12 services than on candidates' political stances. Tr. 595-96
13 (Petracca). The First Amendment, however, prohibits the State from
14 restricting expressive activity in order to promote favored forms
15 of political discourse. Therefore, the State cannot justify term
16 limits on the ground that preventing voters from voting for certain
17 candidates will result in a more elevated form of political debate.

18 vi. Rotation

19 The State also maintains that "term limits reinstate rotation,
20 a central tenet of republican government." By equating term limits
21 with the eighteenth- and nineteenth-century practice of rotation of
22 office, the State seeks to establish that term limits are a
23 legitimate innovation with deep roots in American history. The
24 State also attempts to establish that term limits are entirely
25 consistent with principles of republican self-government.

26 Term limits resemble the historical practice of rotation to
27
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1 the extent that both prevent prolonged, uninterrupted legislative
2 service. As explained above, however, California's extreme version
3 of term limits is quite different from rotation in that it imposes
4 a lifetime cap on legislative service. The State also exaggerates
5 the centrality of rotation to early American political philosophy.
6 It was a widespread practice, but few States imposed rotation as a
7 formal requirement. The Constitutional Convention considered and
8 rejected proposals to require rotation. See U.S. Term Limits, 115
9 S. Ct. at 1859-60.

10 That rotation was a widespread practice in the eighteenth and
11 nineteenth centuries, however, does not establish that California
12 has a compelling or important interest in reinstating rotation and
13 converting it into a lifetime ban. In addition, most of the
14 evidence the State presented concerning rotation antedates the
15 ratification of the Fourteenth Amendment. All of it precedes
16 important Supreme Court decisions concerning voting rights and
17 ballot access. Instituting a form of rotation, therefore, does not
18 constitute a significant State interest.

19 D. Lifetime Term Limits and Narrow Tailoring

20 As explained above, lifetime term limits are not narrowly
21 tailored to achieve the goals articulated by the State. Indeed,
22 the State's own expert testified that he prefers a limit on the
23 number of consecutive terms that legislators may serve to lifetime
24 term limits. He believes that lifetime term limits squander
25 valuable legislative experience. Tr. 687. The most obvious method
26 of making California's version of term limits more narrowly
27
28

1 tailored would be to convert it into a limit on the number of
2 consecutive terms that legislators may serve.¹⁵

3 The State contends, however, that consecutive term limits
4 would not achieve its goals for several reasons. The most
5 significant of these reasons are placeholding legislators and the
6 creation of a revolving door between the legislature and lobbying
7 firms. Tr. 619; see also Eu, 54 Cal. 3d at 523. The State fears
8 that term-limited legislators will make deals with their successors
9 whereby their successors would agree to step aside once their
10 predecessors become eligible for office again. Although it is
11 conceivable that such deals might occasionally be made, such
12 speculation is insufficient to justify permanently restricting
13 voters' choice of candidates. The danger that legislators will
14 leave office to work in lobbying firms only to return to the
15 legislature a few years later can be limited by legislation.

16 The Court therefore rejects the State's contention that
17 consecutive term limits would create problems which are serious
18 enough to justify the imposition of lifetime term limits.

19 E. Summary

20 Two of the interests asserted by the State are compelling:
21 its sovereignty interest in defining its own political institutions
22 and its interest in reducing the unfair electoral advantages
23 incumbents enjoy. The State's other interests do not stand up to
24 close examination.

25
26 ¹⁵The Court expresses no opinion on the constitutionality of
27 any form of term limits other than the lifetime legislative term
28 limits imposed by Proposition 140.

1 The lifetime legislative term limits provisions of the
2 California Constitution are not narrowly tailored to serve the
3 State's compelling interests. The State's sovereign interest in
4 reforming its political institutions is not sufficient, by itself,
5 to justify measures which burden rights protected by the First and
6 Fourteenth Amendments. California's version of lifetime term
7 limits is not narrowly tailored to reduce the electoral advantages
8 of incumbency. A variety of targeted reforms could redress the
9 most troublesome advantages of incumbency. Less drastic versions
10 of term limits would also be effective at significantly reducing
11 the undesirable advantages of incumbency.

12 CONCLUSION

13 The lifetime term limits on State legislative offices enacted
14 by Proposition 140 impose a severe burden on Plaintiffs' First and
15 Fourteenth Amendment rights of voting and association. The State
16 has not established that lifetime term limits are narrowly tailored
17 to serve a compelling State interest.

18 The Court therefore

- 19 1. DECLARES that the lifetime term limits provisions
20 contained in section 2(a) of article IV of the California
21 Constitution violate the United States Constitution;
- 22 2. ENJOINS Defendants Clark and McCormack from enforcing the
23 lifetime term limits provisions contained in section 2(a)
24 of article IV of the California Constitution against
25 Plaintiffs and to accept the declarations of intention to
26 be a candidate and the nomination papers when tendered by
27

1 Plaintiffs Bates, Friedman, or Escutia; and

2 3. ENJOINS Defendant Jones from enforcing the lifetime term
3 limits provisions contained in section 2(a) of article IV
4 of the California Constitution against Plaintiffs, to
5 accept and process the declarations of intention to be a
6 candidate and the nomination documents of Plaintiffs
7 Bates, Friedman, or Escutia, to certify Plaintiff
8 legislators' eligibility to be candidates (if all other
9 requirements are met), and to certify the elections
10 results if Plaintiff legislators win the election.

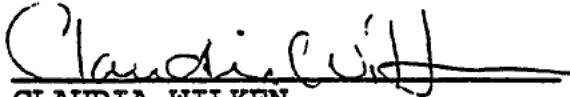
11 STAY PENDING APPEAL

12 Under Federal Rule of Civil Procedure 62(c), the Court has
13 discretion to stay an injunction during the pendency of an appeal.
14 The standard for granting a stay is the same as the standard for
15 granting a preliminary injunction: a showing of "either (1) a
16 combination of probable success on the merits and the possibility
17 of irreparable injury or (2) that serious questions are raised and
18 the balance of hardships tips sharply" in favor of the party
19 subject to the injunction. Tribal Village of Akutan v. Hodel, 859
20 F.2d 662, 663 (9th Cir. 1988) (quoting Los Angeles Memorial
21 Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201
22 (9th Cir. 1980)). The constitutionality of legislative term limits
23 is an issue of first impression in the Ninth Circuit. The State
24 has raised serious questions concerning the constitutionality of
25 term limits. The balance of hardships involved in enforcing the
26 injunction before these questions are finally decided tips sharply

1 in the State's favor. Enjoining enforcement of term limits prior
2 to appellate review may throw the State's electoral process into
3 confusion. Staying the injunction may effectively deny Plaintiffs
4 the opportunity to seek re-election to the Assembly in 1998, but,
5 should the judgment of the Court be affirmed on appeal, it will not
6 permanently deny Plaintiffs the opportunity to seek election to the
7 Assembly. The Court therefore STAYS the injunction granted in this
8 order for thirty days and, if the State files an appeal, during the
9 pendency of the appeal to the Ninth Circuit Court of Appeals.

10
11 IT IS SO ORDERED.

12
13
14 Dated: APR 23 1997


CLAUDIA WILKEN
United States District Judge

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19 Copies mailed to counsel
as noted on the following page
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OPTIONAL FORM NO. 10 (7-88)

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CLERK, U.S. DISTRICT COURT
EUGENE, OREGON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BILL MARKHAM, DARRELL E. BROWN,
and CENTER TO PROTECT FREE
SPEECH, INC.,

Plaintiffs,

v.

PHIL KEISLING, Secretary of
State of the State of Oregon,

Defendant.

Civil No. 97-6237-TC

ORDER

COFFIN, Magistrate Judge:

Plaintiffs bring this action challenging Ballot Measure 3 approved by the Oregon voters on November 3, 1992.¹ Measure 3 is a term limiting provision for state legislators and provides in relevant part:

To promote varied representation, to broaden the opportunities for public service, and to make the electoral process fairer by reducing the power of incumbency, terms in Oregon elected offices are limited as follows:

(1) No person shall serve more than six years in the Oregon House of Representatives, eight years in the Oregon

¹Measure 3 became part of the Oregon Constitution on December 3, 1992 and its text is found in Article II, sections 19 and 20. The provision being challenged here is the term limitation provision for state legislators found in Article II, Section 19. For purposes of this order, the provision will simply be referred to as Measure 3.

Senate, and twelve years in the Oregon Legislative Assembly in his or her lifetime.

.....

(3) Only terms of service beginning after [December 3, 1992] shall count towards the limits of this section.

.....

(5) A person shall not appear on the ballot as a candidate for elected office or be appointed to fill a vacancy in office if serving a full term in such office would cause them to violate the limits in this Section.

On December 4, 1997, this court conducted a hearing on the merits of plaintiff's claims. I now enter the following findings of fact and conclusions of law.

FINDINGS OF FACT

The parties agree that there is no dispute as to the factual matters surrounding this case and have thus submitted a stipulated set of facts which I shall briefly summarize:

Plaintiff Bill Markham is the incumbent member of the Oregon House of Representatives from the 46th district. Plaintiff Markham has served in this capacity from 1968 to 1974 and 1976 to the present. Defendant Kaisling rejected plaintiff Markham's filing for candidacy at the May 1998 biennial primary election for the office of State Representative. But for the limitations imposed by Measure 3, Plaintiff Markham intends to run for reelection in the 46th district in 1998 and Plaintiff Brown intends to vote for him in the 1998 election.

2 - ORDER

CONCLUSIONS OF LAW

Plaintiffs challenge Measure 3 as violative of their First and Fourteenth Amendment voting and associational rights and as violative of the Fourteenth Amendment's Equal Protection clause.

A. Voting and Associational rights

Plaintiffs do not here contend that Measure 3 violates a candidate's right to run for office, but rather assert that it violates their fundamental right to vote and associate with the candidate of their choice. As the Supreme Court has noted: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378 (1964).

The parties agree that the test set forth in Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564 (1983) and explained in Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059 (1992) is the proper standard to apply in determining the constitutionality of the restrictions imposed on ballot access by Measure 3.

The right to vote in any manner and the right to associate for political purposes through the ballot are not absolute. Burdick, 504 U.S. at 433. Election laws will invariably impose some burden upon individual voters, and thus the mere fact that a state's system creates barriers tending to limit the field of candidates from which voters may choose does not of itself compel close scrutiny. Id. The rigorousness of this court's inquiry into the propriety of Measure 3 depends upon the extent to which it burdens First and Fourteenth

Amendment rights. If Measure 3 subjects those rights to what are deemed severe restrictions, it must be narrowly drawn to advance a compelling state interest. See id. at 434. However, if Measure 3 imposes only lesser and reasonable nondiscriminatory restrictions upon First and Fourteenth Amendment rights of voters, Oregon's interests in regulating its own elections should suffice to justify the restrictions. See id. Thus, this court has essentially a two part inquiry:

(1) Does Measure 3 severely burden voters' First and Fourteenth Amendment rights? and

(2) If so, is Measure 3 narrowly tailored to advance a compelling state interest?

If the answer to the first question is no, then Oregon's regulatory interest will suffice to justify Measure 3.

1. Burden on Voting Rights

The recent Ninth Circuit opinion in Jones v. Bates, 127 F.3d 839 (9th Cir. 1997), reh'g en banc granted, 1997 WL 701200 (9th Cir. Nov 04, 1997) leaves little doubt as to the answer to the first question.² The panel decided a similar term limits issue on procedural grounds,

²The Jones court was faced with the issue of the constitutionality of similar lifetime term limits in California. Although the panel found the limits invalid on procedural grounds, the Ninth Circuit has decided to rehear en banc the Jones decision. The court heard oral argument on November 20, and will very likely reach a substantive decision regarding the merits of lifetime term limits imposed on state legislators. In granting the rehearing, however, the Ninth Circuit did not withdraw the decision of the panel and thus the Jones decision remains in effect until the en banc decision is made. Fed. R. App. P. 35-1 to 35-3, note 5. Therefore, this court is bound by the Jones panel decision. Although under normal circumstances I would await the Jones en banc ruling, candidate filing deadlines warrant a more expedited course.

but clearly indicated that lifetime term limits severely burden voters' First and Fourteenth Amendment rights.

In Jones, the Ninth Circuit panel struck down California's lifetime term limits for its legislators because the measure was ambiguous on its face. However, the panel did note that "lifetime term limits impose a penalty on the voters that is both severe and paradoxical." Id. at 854.¹ Defendant's attempts to distinguish the panel's finding of severity in Jones for purposes of invalidating California's term limits on procedural grounds as opposed to applying the Burdick test to the substance of the statute lacks merit. The panel made it abundantly clear that the state-imposed term limits impose a severe burden on voters' First Amendment rights. See, e.g., id. at 855 (in rejecting the argument that term limits reduce existing burdens on voting rights the panel noted that the concept that government may restrict the speech of some to enhance the relative voice of others is wholly foreign to the First Amendment). As the law currently stands in the Ninth Circuit, I must find that lifetime term limits for state legislators impose a severe burden on voters' First

¹The panel noted that the Supreme Court has made it clear that the burden imposed on voters' First Amendment rights by instituting lifetime term limits is severe. Id. at 852, n. 17. (citing U.S. Term Limits v. Thornton, 514 U.S. 779, 115 S.Ct. 1842 (1995)). Indeed the Court in Thornton pointed out that such a state-imposed restriction is contrary to the fundamental principle of our representative democracy, embodied in the Constitution, that the people should choose whom they please to govern them. Thornton, 514 U.S. at 783.

and Fourteenth Amendment rights.⁴ Therefore, it must be determined if Measure 3 is narrowly tailored to advance a compelling state interest.

2. Narrowly Tailored to Advance a Compelling Interest

The Ninth Circuit panel in Jones recognized that a state "has a compelling interest as a sovereign in choosing the structure of its institutions and the qualifications of its officials--an interest that may suffice to render lifetime term limits constitutional." Id. at 844.⁵ However, it is clear that the State's sovereignty interest cannot alone constitute a compelling interest sufficient to withstand the constitutional challenge in this case. In Thornton, the Court recognized that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives. Thornton, 514 U.S. at 794. States may not disregard basic constitutional protections when establishing the conditions of candidacy for state office. Chandler v. Miller, __ U.S. __, 117 U.S. 1295, 1302-03 (1997). Therefore, the adequacy of the specific reasons put forth by the State must be examined.

The State essentially relies on three interests to support term limits: 1) promotion of varied representation; 2) broadening opportunities for public service; and 3) reducing the powers of

⁴Honorable Claudia Wilken of the United States District Court for the Northern District of California provides a thorough and well-reasoned discussion of the burden imposed on voting and associational rights in her decision in Bates v. Jones, 958 F.Supp. 1446, 1459-1464 (N.D.Cal. 1997), aff'd on other grounds sub nom, Jones v. Bates, 127 F.3d, 839 (9th Cir. 1997), reh'g en banc granted, 1997 WL 701200 (9th Cir. Nov 04, 1997).

⁵The panel did not, however, decide that question.

incumbency.⁶ Amicus Curia also add rotation as an interest advanced by Measure 3.⁷

a. Promotion of Varied Representation

With Measure 3 the State hopes to invigorate the political and ideological climate and to substitute citizen-legislators for professional legislators. While varied representation may indeed be a compelling interest, the State seeks to achieve this objective by permanently silencing certain elements of society. The idea that a state may restrict the speech elements of "professional legislators" and their supporters in order to enhance the voice of "citizen-legislators" and their supporters is foreign to the First Amendment. See Buckley v. Valeo, 424 U.S. 1, 48-50, 96 S.Ct. 612, 648-649 (1976). Further, the ability of term limits to improve the demographic representation of the legislature is speculative at best. Thus, the State does not have a legitimate interest in preventing voters from expressing their preference for incumbent legislators.

⁶Similar interests are discussed in Judge Wilken's decision in Bates, 958 F.Supp. at 1466-1471. Judge Wilken provides solid reasoning as to why such interests do not survive constitutional scrutiny where term limits invoke a lifetime ban on incumbents.

⁷Rotation is not, in actuality, an interest advanced by Measure 3 so much as it is the mechanism embodied in the measure. A state cannot justify a regulation which imposes a severe burden on constitutional rights by pointing to the regulation itself as justification. Further, Judge Wilken's historical discussion points out that the framers of the Constitution rejected the idea of rotation. See Bates, 958 F.Supp at 1453. The idea that a state's interest in rotation trumps the First Amendment lacks merit. Cf. Thornton, 514 U.S. 779 (states may not impose qualifications for national representatives beyond those prescribed by the Constitution). Moreover, the Twenty-second Amendment (rotation for the office of President) does not demonstrate the constitutionality of term limits for representatives in the absence of a similar constitutional amendment.

b. Broadening Opportunities for Public Service

This interest suffers from the same infirmity as the previous, i.e., a state cannot silence one segment of society to enhance the voice of another. The state asserts that Measure 3 increases competition for legislative seats by creating more open seats. However, competition is not enhanced by eliminating, as the State asserts, the competitor most likely to win. Competition is enhanced by allowing all to compete, including incumbents, because it promotes electoral accountability. As with promoting varied representation, the state does not have a legitimate interest in impermissibly eliminating certain segments of society from electoral competition for the benefit of others.

c. Reducing the Powers of Incumbency

As Judge Wilken noted the State may indeed have a legitimate interest in reducing some powers of incumbency (although certainly not all) such as fund-raising ability, the perquisites of office, and control over legislative redistricting, because such powers hinder political accountability and discourage political opposition. Bates, 958 F.Supp. at 1468. However, as will be discussed below, Measure 3 is not narrowly tailored to achieve this goal.

d. Narrowly Tailored

Even if the interests asserted by the State were compelling, Measure 3 is not narrowly tailored to achieve those interests. It is quite easy to see that consecutive term limits would just as easily

achieve the goals asserted while providing a much less severe burden on the constitutional rights of Oregon's voters.⁵

The State asserts that narrowly tailored does not mean the least burdensome alternative. How compelling the interest and how narrow the tailoring must be depends on the substantiality of the liberty interest and the extent of the burden placed upon it. See, e.g., Planned Parenthood v. Casey, 505 U.S. 875, 871-874, 112 S.Ct. 2791, 2817-2819 (1992). The measure must be narrowly drawn to express only those compelling interests it seeks to advance.

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Williams v. Rhodes, 393 U.S. 23, 31, 89 S.Ct. 5, 10 (1968). As noted above, the burden on this right is severe -- the ability of voters to vote for a term limited candidate is forever barred. The Ninth Circuit panel in Jones noted that lifetime term limits far exceed any limitation imposed by laws that simply regulate the state electoral process. Jones, 127 P.3d at 852. Because the burden is so severe, the court must ensure that Measure 3 is narrowly drawn to advance only the compelling interests it purports to advance. It is not. Measure 3 goes beyond the pale of narrowness by forever barring certain segments of society from voting for their candidate of choice and permanently silencing

⁵Consecutive term limits would only require an incumbent legislator to sit out for a term or two before again becoming eligible for elected office. This court does not express an opinion as to the constitutionality of consecutive term limits.

Certainly consecutive term limits can address any legitimate concerns with the advantages of incumbency while providing less of a burden on important fundamental rights. As the Jones panel noted, "unlike consecutive term limits, which are designed to obviate any unfair advantages incumbents may have, lifetime term limits do not simply provide a hiatus from the office, but rather, impose a permanent ban." Id. at 854. Judge Wilken noted many other much less burdensome alternatives to address the problems of incumbency such as campaign finance reform, elimination of the perquisites of office through the initiative process, etc. Bates, 958 F.Supp at 1468. Again, even assuming that the State has provided other compelling interests it has failed to show why the less burdensome alternative of consecutive term limits would not suffice to advance these interests.

The State argues that consecutive term limits will not adequately address its legitimate concerns regarding advantages of incumbency because consecutive limits would merely result in career politicians who trade terms with each other so that they may continue to enjoy the unfair advantages of incumbency. Such is pure speculation¹⁸ and is

'Because Measure 3 imposes a lifetime term limit, those who prefer a legislative voice based on experience, and an investment of time and effort in becoming familiar with a particular district through legislative representation are permanently deprived of their right to vote for their candidate once he or she reaches a certain level of experience.

"The State cites Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986) for the proposition that a state "can respond to potential deficiencies in the electoral process with foresight (continued...)"

insufficient to justify such a severe burden on the right of voters to "vote for whom they please."¹¹

3. Voting and Associational Rights -- Conclusion

In sum, I agree with the careful and thoughtfully reasoned decision of Judge Wilken in Bates that lifetime term limits for state legislators are unconstitutional. The burden imposed on important and fundamental voting and associational rights by Measure 3 is severe. The State has not demonstrated that Measure 3 is narrowly tailored to serve a compelling interest. Therefore, I find that Measure 3 violates the First and Fourteenth Amendments of the United States Constitution.

B. Equal Protection

Because Measure 3 targets those voters, such as plaintiff Brown, who prefer to vote for experienced candidates and denies them the right to do so, it directly affects their ability to participate on an equal basis in self-government.¹² Such a classification involves a

"(...continued)
rather than reactively." What the state fails to note is that a state can do so provided that the response is reasonable and does not significantly impinge on constitutionally protected rights. As noted above the State's response to speculation that unfair advantages to incumbency can only be resolved by lifetime term limits severely impinges on protected constitutional rights.

"The State also notes that consecutive term limits would do nothing to eliminate name recognition. I fail to see how the State even has a legitimate interest in eliminating such an advantage. Further, lifetime term limits do not eradicate name recognition associated with athletes, movie celebrities, news anchors, etc. who seek political office and who would enjoy the same advantages over lesser known candidates.

"Judge Wilken provides a thoughtful discussion on why term limits impose a content-based restriction on the ability of voters
(continued...)

fundamental constitutional right and thus must be narrowly tailored to serve a compelling state interest. See, e.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666, 110 S.Ct. 1391, 1401 (1990). For the reasons stated above, the State fails to demonstrate that the classification in Measure 3 meets this standard. Therefore, I find that Measure 3, violates the Equal Protection Clause of the Fourteenth Amendment.

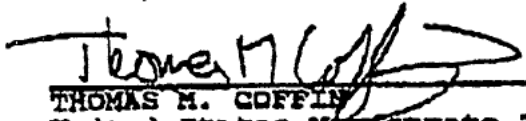
C. Relief to be Afforded

In view of the above, the court grants plaintiffs' request to enjoin enforcement of Measure 3. However, because the panel's decision in Jones (striking down California's term limits law) has been stayed pending the en banc decision in that case, this court will stay the order granting injunctive relief for at least 30 days in order to allow the state to seek appellate review of this decision.

CONCLUSION

For the reasons stated above, this court declares that the lifetime term limits provision regarding state legislators found in Article II, Section 19, of the Oregon Constitution violates the United States Constitution.

DATED this 16th day of December, 1997.


THOMAS M. COFFIN
United States Magistrate Judge

¹²(...continued)
to vote for the candidates of their choice at page 1462-63 of her decision.

12 - ORDER



OPINIONS ANNOUNCED MAY 22, 1995

The Supreme Court decided:

ARBITRATION AND MEDIATION—Federal Arbitration Act

Arbitrability of dispute under Federal Arbitration Act is primarily matter for arbitrator if parties have agreed to submit arbitrability question itself to arbitration but otherwise should be decided independently by court; federal district court order confirming or refusing to vacate arbitration award is subject to ordinary standards of review on appeal, and thus findings of fact are reviewable under clearly erroneous standard and questions of law are reviewable de novo, rather than under abuse of discretion standard. (*First Options of Chicago Inc. v. Kaplan*, No. 94-560) Page 4459

CRIMINAL LAW AND PROCEDURE—Search and Seizure

Fourth Amendment's reasonableness requirement obligates law enforcement officers, in some circumstances, to knock and announce their presence and authority before forcibly entering dwelling. (*Wilson v. Arkansas*, No. 94-5707) Page 4456

ELECTIONS—Candidates

State-imposed limits on number of terms that members of state's U.S. congressional delegation may serve are prohibited by exclusive list of qualifications for members of Congress contained in Qualifications Clauses of U.S. Constitution, Article I, Sections 2 and 3; states may not evade strictures of Qualifications Clauses by casting term limitations as ballot access restrictions subject to states' power under Article I, Section 4, clause 1 to regulate "Times, Places and Manner" of congressional elections. (*U.S. Term Limits Inc. v. Thornton*, Nos. 93-1456 & 93-1828) Page 4413

Full Text of Opinions

Nos. 93-1456 AND 93-1828

U. S. TERM LIMITS, INC., ET AL., PETITIONERS
93-1456
v.
RAY THORNTON ET AL.

WINSTON BRYANT, ATTORNEY GENERAL OF
ARKANSAS, PETITIONER
93-1828
v.
BOBBIE E. HILL ET AL.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF
ARKANSAS

Syllabus

No. 93-1456. Argued November 29, 1994—Decided May 22, 1995*

Respondent Hill filed this suit in Arkansas state court challenging the constitutionality of §3 of Amendment 73 to the Arkansas Constitution, which prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The trial court held that §3 violated Article I of the Federal Constitution, and the Arkansas Supreme Court affirmed. A plurality of the latter court concluded that the States have no authority "to change, add to, or diminish" the age, citizenship, and residency requirements for congressional service enumerated in the Qualifications Clauses, U. S. Const., Art. I, §2, cl. 2, and Art. I, §3, cl. 3, and rejected the argument that Amendment 73 is constitutional because it is formulated as a ballot access restriction rather than an outright disqualification of congressional incumbents.

Held: Section 3 of Amendment 73 to the Arkansas Constitution violates the Federal Constitution.

(a) The power granted to each House of Congress to judge the "Qualifications of its own Members," Art. I, §5, cl. 1, does not include the power to alter or add to the qualifications set forth in the Constitution's text. *Powell v. McCormack*, 395 U. S. 486, 540. After examining *Powell's* analysis of the Qualifications Clauses' history and text, *id.*, at 518-548, and its articulation of the "basic principles of our democratic system," *id.*, at 548, this Court reaffirms that the constitutional qualifications for congressional service are "fixed," at least in the sense that they may not be supplemented by Congress.

(b) So too, the Constitution prohibits States from imposing congressional qualifications additional to those specifically enumerated in its text. Petitioners' argument that States possess control over qualifications as part of the original powers reserved to them

* Together with No. 93-1828, *Bryant, Attorney General of Arkansas v. Hill et al.*, also on certiorari to the same court.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released *** at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

by the Tenth Amendment is rejected for two reasons. First, the power to add qualifications is not within the States' pre-Tenth-Amendment "original powers," but is a new right arising from the Constitution itself, and thus is not reserved. Second, even if the States possessed some original power in this area, it must be concluded that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby "divested" States of any power to add qualifications. That this is so is demonstrated by the unanimity among the courts and learned commentators who have considered the issue; by the Constitution's structure and the text of pertinent constitutional provisions, including Art. I, §2, cl. 1, Art. I, §4, cl. 1, Art. I, §6, and Art. I, §5, cl. 1; by the relevant historical materials, including the records of the Constitutional Convention and the ratification debates, as well as Congress' subsequent experience with state attempts to impose qualifications; and, most importantly, by the "fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them," *Powell*, 395 U. S., at 547. Permitting individual States to formulate diverse qualifications for their congressional representatives would result in a patchwork that would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. The fact that, immediately after the adoption of the Constitution, many States imposed term limits and other qualifications on state officers, while only one State imposed such a qualification on Members of Congress, provides further persuasive evidence of a general understanding that the qualifications in the Constitution were unalterable by the States.

(c) A state congressional term limits measure is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly. The Court rejects petitioners' argument that Amendment 73 is valid because it merely precludes certain congressional candidates from being certified and having their names appear on the ballot, and allows them to run as write-in candidates and serve if elected. Even if petitioners' narrow understanding of qualifications is correct, Amendment 73 must fall because it is an indirect attempt to evade the Qualifications Clauses' requirements and trivializes the basic democratic principles underlying those Clauses. Nor can the Court agree with petitioners' related argument that Amendment 73 is a permissible exercise of state power under the Elections Clause, Art. I, §4, cl. 1, to regulate the "Times, Places and Manner of holding Elections." A necessary consequence of that argument is that Congress itself would have the power under the Elections Clause to "make or alter" a measure such as Amendment 73, a result that is unfathomable under *Powell*. Moreover, petitioners' broad construction is fundamentally inconsistent with the Framers' view of the Elections Clause, which was intended to grant States authority to protect the integrity and regularity of the election process by regulating election procedures, see, e.g., *Storer v. Brown*, 415 U. S. 724, 730, 733, not to provide them with license to impose substantive qualifications that would exclude classes of candidates from federal office.

(d) State imposition of term limits for congressional service would effect such a fundamental change in the constitutional framework that it must come through a constitutional amendment properly passed under the procedures set forth in Article V. Absent such an amendment, allowing individual States to craft their own congressional qualifications would erode the structure designed by the Framers to form a "more perfect Union."

316 Ark. 251, 872 S. W. 2d 349, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined.

JUSTICE STEVENS delivered the opinion of the Court.

The Constitution sets forth qualifications for membership in the Congress of the United States. Article I, §2, cl. 2, which applies to the House of Representatives, provides:

"No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an

Inhabitant of that State in which he shall be chosen."

Article I, §3, cl. 3, which applies to the Senate, similarly provides:

"No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

Today's cases present a challenge to an amendment to the Arkansas State Constitution that prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The Arkansas Supreme Court held that the amendment violates the Federal Constitution. We agree with that holding. Such a state-imposed restriction is contrary to the "fundamental principle of our representative democracy," embodied in the Constitution, that "the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U. S. 486, 547 (1969) (internal quotation marks omitted). Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended.

I

At the general election on November 3, 1992, the voters of Arkansas adopted Amendment 73 to their State Constitution. Proposed as a "Term Limitation Amendment," its preamble stated:

"The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials."

The limitations in Amendment 73 apply to three categories of elected officials. Section 1 provides that no elected official in the executive branch of the state government may serve more than two 4-year terms. Section 2 applies to the legislative branch of the state government; it provides that no member of the Arkansas House of Representatives may serve more than three 2-year terms and no member of the Arkansas Senate may serve more than two 4-year terms. Section 3, the provision at issue in these cases, applies to the Arkansas Congressional Delegation. It provides:

"(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

"(b) Any person having been elected to two or more terms as a member of the United States

Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas."

Amendment 73 states that it is self-executing and shall apply to all persons seeking election after January 1, 1993.

On November 13, 1992, respondent Bobbie Hill, on behalf of herself, similarly situated Arkansas "citizens, residents, taxpayers and registered voters," and the League of Women Voters of Arkansas, filed a complaint in the Circuit Court for Pulaski County, Arkansas, seeking a declaratory judgment that §3 of Amendment 73 is "unconstitutional and void." Her complaint named as defendants then-Governor Clinton, other state officers, the Republican Party of Arkansas, and the Democratic Party of Arkansas. The State of Arkansas, through its Attorney General, petitioner Winston Bryant, intervened as a party defendant in support of the amendment. Several proponents of the amendment also intervened, including petitioner U. S. Term Limits, Inc.

On cross-motions for summary judgment, the Circuit Court held that §3 of Amendment 73 violated Article I of the Federal Constitution.¹

With respect to that holding, in a 5-to-2 decision, the Arkansas Supreme Court affirmed. *U. S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S. W. 2d 349, 351 (1994). Writing for a plurality of three justices, Justice Robert L. Brown concluded that the congressional restrictions in Amendment 73 are unconstitutional because the States have no authority "to change, add to, or diminish" the requirements for congressional service enumerated in the Qualifications Clauses. *Id.*, at 265, 872 S. W. 2d, at 356. He noted:

"If there is one watchword for representation of the various states in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. . . . The uniformity in qualifications mandated in Article 1 provides the tenor and the fabric for representation in the Congress. Piecemeal restrictions by State would fly in the face of that order." *Ibid.*

Justice Brown's plurality opinion also rejected the argument that Amendment 73 is "merely a ballot access amendment," concluding that "[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." *Id.*, at 265-266, 872 S. W. 2d, at 356-357. Justice Brown considered the possibilities that an excluded candidate might run for Congress as a write-in candidate or be appointed to fill a vacancy to be "glimmers of opportunity . . . [that] are faint indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack." *Id.*, at 266, 872 S. W. 2d, at 357. In separate opinions, Justice Dudley and Justice Gerald P. Brown agreed that Amendment 73 violates the Federal Constitution.

¹The Circuit Court also held that §3 was severable from the other provisions of the amendment, but that the entire amendment was void under state law for lack of an enacting clause. App. to Pet. for Cert. in No. 93-1456, p. 60a. The Arkansas Supreme Court affirmed the Circuit Court's decision regarding severability, *U. S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 270, 872 S. W. 2d 349, 359 (1994), and reversed its decision regarding the enacting clause, *id.*, at 263, 872 S. W. 2d, at 355. The decision of the Arkansas Supreme Court with respect to those issues of state law is not before us.

Two Justices dissented from the federal constitutional holding. Justice Hays started from "the premise that all political authority resides in the people, limited only by those provisions of the federal or state constitutions specifically to the contrary." 316 Ark., at 281, 872 S. W. 2d, at 367. Because his examination of the text and history of the Qualifications Clauses convinced him that the Constitution contains no express or implicit restriction on the States' ability to impose additional qualifications on candidates for Congress, Justice Hays concluded that §3 is constitutional. Special Chief Justice Cracraft, drawing a distinction between a measure that "impose[s] an absolute bar on incumbent succession," and a measure that "merely makes it more difficult for an incumbent to be elected," *id.*, at 284, 872 S. W. 2d, at 368, concluded that Amendment 73 does not even implicate the Qualifications Clauses, and instead is merely a permissible ballot access restriction.

The State of Arkansas, by its Attorney General, and the intervenors petitioned for writs of certiorari. Because of the importance of the issues, we granted both petitions and consolidated the cases for argument. See 512 U. S. __ (1994). We now affirm.

II

As the opinions of the Arkansas Supreme Court suggest, the constitutionality of Amendment 73 depends critically on the resolution of two distinct issues. The first is whether the Constitution forbids States from adding to or altering the qualifications specifically enumerated in the Constitution. The second is, if the Constitution does so forbid, whether the fact that Amendment 73 is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance. Our resolution of these issues draws upon our prior resolution of a related but distinct issue: whether Congress has the power to add to or alter the qualifications of its Members.

Twenty-six years ago, in *Powell v. McCormack*, 395 U. S. 486 (1969), we reviewed the history and text of the Qualifications Clauses² in a case involving an attempted exclusion of a duly elected Member of Congress. The principal issue was whether the power granted to each House in Art. I, §5, to judge the

²As we explained, that term may describe more than the provisions quoted, *supra*, at 1:

"In addition to the three qualifications set forth in Art. I, §2, Art. I, §3, cl. 7, authorizes the disqualification of any person convicted in an impeachment proceeding from 'any Office of honor, Trust or Profit under the United States'; Art. I, §6, cl. 2, provides that 'no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office'; and §3 of the 14th Amendment disqualifies any person 'who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.' It has been argued that each of these provisions, as well as the Guarantee Clause of Article IV and the oath requirement of Art. VI, cl. 3, is no less a 'qualification' within the meaning of Art. I, §5, than those set forth in Art. I, §2." *Powell v. McCormack*, 395 U. S. 486, 520, n. 41 (1969).

In *Powell*, we saw no need to resolve the question whether those additional provisions constitute "qualifications," because "both sides agree that Powell was not ineligible under any of these provisions." *Ibid.* We similarly have no need to resolve that question today: Because those additional provisions are part of the text of the Constitution, they have little bearing on whether Congress and the States may add qualifications to those that appear in the Constitution.

"Qualifications of its own Members"³ includes the power to impose qualifications other than those set forth in the text of the Constitution. In an opinion by Chief Justice Warren for eight Members of the Court,⁴ we held that it does not. Because of the obvious importance of the issue, the Court's review of the history and meaning of the relevant constitutional text was especially thorough. We therefore begin our analysis today with a full statement of what we decided in that case.

THE ISSUE IN POWELL

In November 1966, Adam Clayton Powell, Jr., was elected from a District in New York to serve in the United States House of Representatives for the 90th Congress. Allegations that he had engaged in serious misconduct while serving as a committee chairman during the 89th Congress led to the appointment of a Select Committee to determine his eligibility to take his seat. That Committee found that Powell met the age, citizenship, and residency requirements set forth in Art. I, §2, cl. 2. The Committee also found, however, that Powell had wrongfully diverted House funds for the use of others and himself and had made false reports on expenditures of foreign currency. Based on those findings, the House after debate adopted House Resolution 278, excluding Powell from membership in the House, and declared his seat vacant. See 395 U. S., at 489-493.

Powell and several voters of the District from which he had been elected filed suit seeking a declaratory judgment that the House Resolution was invalid because Art. I, §2, cl. 2, sets forth the exclusive qualifications for House membership. We ultimately accepted that contention, concluding that the House of Representatives has no "authority to exclude" any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.⁵ 395 U. S., at 522 (emphasis in original); see also *id.*, at 547.⁶ In reaching that conclusion, we undertook a detailed historical review to determine the intent of the Framers. Though recognizing that the Constitutional Convention debates themselves were inconclusive, see *id.*, at 532, we determined that the "relevant historical

materials" reveal that Congress has no power to alter the qualifications in the text of the Constitution, *id.*, at 522.

POWELL'S RELIANCE ON HISTORY

We started our analysis in *Powell* by examining the British experience with qualifications for membership in Parliament, focusing in particular on the experience of John Wilkes. While serving as a member of Parliament, Wilkes had published an attack on a peace treaty with France. This literary endeavor earned Wilkes a conviction for seditious libel and a 22-month prison sentence. In addition, Parliament declared Wilkes ineligible for membership and ordered him expelled. Despite (or perhaps because of) these difficulties, Wilkes was reelected several times. Parliament, however, persisted in its refusal to seat him. After several years of Wilkes' efforts, the House of Commons voted to expunge the resolutions that had expelled Wilkes and had declared him ineligible, labeling those prior actions "subversive of the rights of the whole body of electors of this kingdom." *Id.*, at 528, quoting 22 Parliamentary History England 1411 (1782) (Parl. Hist. Eng.). After reviewing Wilkes' "long and bitter struggle for the right of the British electorate to be represented by men of their own choice," 395 U. S., at 528, we concluded in *Powell* that "on the eve of the Constitutional Convention, English precedent stood for the proposition that 'the law of the land had regulated the qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.'" *Ibid.*, at 528, quoting 16 Parl. Hist. Eng. 589, 590 (1769).

Against this historical background, we viewed the Convention debates as manifesting the Framers' intent that the qualifications in the Constitution be fixed and exclusive. We found particularly revealing the debate concerning a proposal made by the Committee of Detail that would have given Congress the power to add property qualifications. James Madison argued that such a power would vest "an improper & dangerous power in the Legislature," by which the Legislature "can by degrees subvert the Constitution." 395 U. S., at 533-534, quoting 2 Records of the Federal Convention of 1787, pp. 249-250 (M. Farrand ed. 1911) (hereinafter *Farrand*).⁷ Madison continued: "A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." 395 U. S., at 534, quoting 2 *Farrand* 250. We expressly noted that the "parallel between Madison's arguments and those made in Wilkes' behalf is striking." 395 U. S., at 534.

The Framers further revealed their concerns about congressional abuse of power when Gouverneur Morris suggested modifying the proposal of the Committee of Detail to grant Congress unfettered power to add qualifications. We noted that Hugh Williamson "expressed concern that if a majority of the legislature should happen to be 'composed of any particular description of men, of lawyers for example, . . . the future

³Art. I, §5, cl. 1, provides in part: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business . . ."

⁴Justice Stewart dissented on procedural grounds, arguing that the case should have been dismissed as moot. See 395 U. S., at 559-561. Other than expressing agreement with the characterization of the case as raising constitutional issues which "touch the bedrock of our political system [and] strike at the very heart of representative government," *id.*, at 573, Justice Stewart did not comment on the merits.

⁵The *Powell* Court emphasized the word "exclude" because it had been argued that the House Resolution depriving Powell of his seat should be viewed as an expulsion rather than an exclusion. Having rejected that submission, the Court expressed no opinion on issues related to the House's power to expel a member who has been sworn in and seated.

⁶Though *Powell* addressed only the power of the House, the Court pointed out that its rationale was equally applicable to the Senate: "Since Art. I, §5, cl. 1, applies to both Houses of Congress, the scope of the Senate's power to judge the qualification of its members necessarily is identical to the scope of the House's power, with the exception, of course, that Art. I, §3, cl. 3, establishes different age and citizenship requirements for membership in the Senate." *Id.*, at 522, n. 44.

⁷Though we recognized that Madison was responding to a proposal that would have allowed Congress to impose property restrictions, we noted that "Madison's argument was not aimed at the imposition of a property qualification as such, but rather at the delegation to the Congress of the discretionary power to establish any qualifications." *Id.*, at 534.

elections might be secured to their own body." *Id.*, at 535, quoting 2 Farrand 250. We noted too that Madison emphasized the British Parliament's attempts to regulate qualifications, and that he observed: "[T]he abuse they had made of it was a lesson worthy of our attention." 395 U. S., at 535, quoting 2 Farrand 250. We found significant that the Convention rejected both Morris' modification and the Committee's proposal.

We also recognized in *Powell* that the post-Convention ratification debates confirmed that the Framers understood the qualifications in the Constitution to be fixed and unalterable by Congress. For example, we noted that in response to the antifederalist charge that the new Constitution favored the wealthy and well-born, Alexander Hamilton wrote:

"The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. . . . The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature." 395 U. S., at 539, quoting *The Federalist* No. 60, p. 371 (C. Rossiter ed. 1961) (emphasis added) (hereinafter *The Federalist*).

We thus attached special significance to "Hamilton's express reliance on the immutability of the qualifications set forth in the Constitution." 395 U. S., at 540. Moreover, we reviewed the debates at the state conventions and found that they "also demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution." *Ibid.*; see, e. g., *id.*, at 541, citing 3 Debates on the Adoption of the Federal Constitution 8 (J. Elliot ed. 1863) (hereinafter *Elliot's Debates*) (Wilson Carey Nicholas, Virginia).⁸

The exercise by Congress of its power to judge the qualifications of its Members further confirmed this understanding. We concluded that, during the first 100 years of its existence, "Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution." 395 U. S., at 542.

As this elaborate summary reveals, our historical analysis in *Powell* was both detailed and persuasive. We thus conclude now, as we did in *Powell*, that history shows that, with respect to Congress, the Framers intended the Constitution to establish fixed qualifications.⁹

⁸Our examination of the history also caused us to reject the argument that the negative phrasing of the Clauses indicated that the Framers did not limit the power of the House to impose additional qualifications for membership. *Id.*, at 537 (noting that the Committee of Style, which edited the Qualifications Clauses to incorporate "their present negative form," had "no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so"), *id.*, at 539, quoting C. Warren, *The Making of the Constitution* 422, n. 1 (1947) (hereinafter *Warren*); see also 2 Farrand 553 (the Committee of Style was appointed "to revise the stile and arrange the articles which had been agreed to").

⁹The text of the Qualifications Clauses also supports the result we reached in *Powell*. John Dickinson of Delaware observed that the enumeration of a few qualifications "would by implication tie up the hands of the Legislature from supplying omissions." 2 Farrand 123. Justice Story made the same point:

POWELL'S RELIANCE ON DEMOCRATIC PRINCIPLES

In *Powell*, of course, we did not rely solely on an analysis of the historical evidence, but instead complemented that analysis with "an examination of the basic principles of our democratic system." *Id.*, at 548. We noted that allowing Congress to impose additional qualifications would violate that "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'" *Id.*, at 547, quoting 2 *Elliot's Debates* 257 (A. Hamilton, New York).

Our opinion made clear that this broad principle incorporated at least two fundamental ideas.¹⁰ First, we emphasized the egalitarian concept that the opportunity to be elected was open to all.¹¹ We noted in particular Madison's statement in *The Federalist* that "[u]nder these reasonable limitations [enumerated in the Constitution], the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Powell*, 395 U. S., at 540, n. 74, quoting *The Federalist* No. 52, at 326. Similarly, we noted that Wilson Carey Nicholas defended the Constitution against the charge that it "violated democratic principles" by arguing: "It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence." 395 U. S., at 541, quoting 3 *Elliot's Debates* 8.

Second, we recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their

"It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." 1 J. Story, *Commentaries on the Constitution of the United States* §625 (3d ed. 1858) (hereinafter *Story*). See also Warren 421 ("As the Constitution . . . expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply").

As Dickinson's comment demonstrates, the Framers' were well aware of the *expressio unius* argument that would result from their wording of the Qualifications Clauses; they adopted that wording nonetheless. There thus is no merit either to the dissent's suggestion that Story was the first to articulate the *expressio unius* argument, see *post* at 25-26, or to the dissent's assertion that that argument is completely without merit.

¹⁰The principle also incorporated the more practical concern that reposing the power to adopt qualifications in Congress would lead to a self-perpetuating body to the detriment of the new republic. See, e. g., *Powell*, 395 U. S., at 533-534, quoting 2 Farrand 250 (Madison) ("If the Legislature could regulate [the qualification of electors or elected], it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect"); 395 U. S., at 535-536 (citing statements of Williamson and Madison emphasizing the potential for legislative abuse).

¹¹Contrary to the dissent's suggestion, *post*, at 37, we do not understand *Powell* as reading the Qualifications Clauses "to create a personal right to be a candidate for Congress." The Clauses did, however, further the interest of the people of the entire Nation in keeping the door to the National Legislature open to merit of every description.

representatives to the National Government. For example, we noted that "Robert Livingston . . . endorsed this same fundamental principle: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.'" 395 U. S., at 541, n. 76, quoting 2 Elliot's Debates 292-293. Similarly, we observed that "[b]efore the New York convention . . . , Hamilton emphasized: 'The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.'" 395 U. S., at 540-541, quoting 2 Elliot's Debates 257. Quoting from the statement made in 1807 by the Chairman of the House Committee on Elections, we noted that "restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society.'" 395 U. S., at 543, quoting 17 Annals of Cong. 874 (1807). Thus, in *Powell*, we agreed with the sentiment expressed on behalf of Wilkes' admission to Parliament: "That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution." 395 U. S., at 534, n. 65, quoting 16 Parl. Hist. Eng. 589-590 (1769).

Powell thus establishes two important propositions: first, that the "relevant historical materials" compel the conclusion that, at least with respect to qualifications imposed by Congress, the Framers intended the qualifications listed in the Constitution to be exclusive; and second, that that conclusion is equally compelled by an understanding of the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'" 395 U. S., at 547.

POWELL'S HOLDING

Petitioners argue somewhat half-heartedly that the narrow holding in *Powell*, which involved the power of the House to exclude a member pursuant to Art. I, §5, does not control the more general question whether Congress has the power to add qualifications. *Powell*, however, is not susceptible to such a narrow reading. Our conclusion that Congress may not alter or add to the qualifications in the Constitution was integral to our analysis and outcome. See, e.g., *id.*, at 540 (noting "Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution"). Only two Terms ago we confirmed this understanding of *Powell* in *Nixon v. United States*, 506 U. S. __ (1993). After noting that the three qualifications for membership specified in Art. I, §2, are of "a precise, limited nature" and "unalterable by the legislature," we explained:

"Our conclusion in *Powell* was based on the fixed meaning of '[q]ualifications' set forth in Art. I, §2. The claim by the House that its power to 'be the Judge of the Elections, Returns and Qualifications of its own Members' was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only

qualifications which might be imposed for House membership." *Id.*, at __ (slip op. at 12-13).¹²

Unsurprisingly, the state courts and lower federal courts have similarly concluded that *Powell* conclusively resolved the issue whether Congress has the power to impose additional qualifications. See, e.g., *Joyner v. Mofford*, 706 F.2d 1523, 1528 (CA9 1983) ("In *Powell* . . . , the Supreme Court accepted this restrictive view of the Qualifications Clause—at least as applied to Congress"); *Michel v. Anderson*, 14 F.3d 623 (CA DC 1994) (citing *Nixon's* description of *Powell's* holding); *Stumpf v. Lau*, 108 Nev. 826, 830, 839 P.2d 120, 122 (1992) (citing *Powell* for the proposition that "[n]ot even Congress has the power to alter qualifications for these constitutional federal officers").¹³

In sum, after examining *Powell's* historical analysis and its articulation of the "basic principles of our democratic system," we reaffirm that the qualifications for service in Congress set forth in the text of the Constitution are "fixed," at least in the sense that they may not be supplemented by Congress.

¹² JUSTICE THOMAS's dissent purports to agree with the outcome of *Powell*, but rejects the reasoning in the opinion. The dissent treats *Powell* as simply an application of the "default rule" that if "the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it." *Post*, at 4, 33, 43. However, there is not a word in the Court's opinion in *Powell* suggesting that the decision rested on the "default rule" that undergirds the dissent's entire analysis. On the contrary, as the excerpt from *Nixon* quoted in the text plainly states, our conclusion in *Powell* was based on our understanding of the "fixed meaning of '[q]ualifications' set forth in Art. I, §2." We concluded that the Framers affirmatively intended the qualifications set forth in the text of the Constitution to be exclusive in order to effectuate the principle that in a representative democracy the people should choose whom they please to govern them.

Moreover, the Court has never treated the dissent's "default rule" as absolute. In *McCulloch v. Maryland*, 4 Wheat. 316 (1819), for example, Chief Justice Marshall rejected the argument that the Constitution's silence on state power to tax federal instrumentalities requires that States have the power to do so. Under the dissent's unyielding approach, it would seem that *McCulloch* was wrongly decided. Similarly, the dissent's approach would invalidate our dormant Commerce Clause jurisprudence, because the Constitution is clearly silent on the subject of state legislation that discriminates against interstate commerce. However, though JUSTICE THOMAS has endorsed just that argument, see, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U. S. __ (1995) (SCALIA, J., concurring in judgment, joined by THOMAS, J.), the Court has consistently rejected that argument and has continued to apply the dormant Commerce Clause, see, e.g., *id.*, at __ (slip op., at 3-4); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U. S. 888 (1988).

¹³ Our decision in *Powell* and its historical analysis were consistent with prior decisions from state courts. For example, in *State ex rel. Johnson v. Crane*, 65 Wyo. 189, 197 P.2d 864 (1948), the Wyoming Supreme Court undertook a detailed historical analysis and concluded that the Qualifications Clauses were exclusive. Several other courts reached the same result, though without performing the same detailed historical analysis. See, e.g., *Hellmann v. Collier*, 217 Md. 93, 141 A.2d 908 (1958); *State ex rel. Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918); *State ex rel. Eaton v. Schmahl*, 140 Minn. 219, 167 N. W. 481 (1918); see generally *State ex rel. Johnson v. Crane*, 65 Wyo., at 204-213, 197 P.2d, at 869-874 (citing cases).

The conclusion and analysis were also consistent with the positions taken by commentators and scholars. See, e.g., n. 9, *supra*; see also Warren 412-422 (discussing history and concluding that "[t]he elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications").

III

Our reaffirmation of *Powell*, does not necessarily resolve the specific questions presented in these cases. For petitioners argue that whatever the constitutionality of additional qualifications for membership imposed by Congress, the historical and textual materials discussed in *Powell* do not support the conclusion that the Constitution prohibits additional qualifications imposed by States. In the absence of such a constitutional prohibition, petitioners argue, the Tenth Amendment and the principle of reserved powers require that States be allowed to add such qualifications.

Before addressing these arguments, we find it appropriate to take note of the striking unanimity among the courts that have considered the issue. None of the overwhelming array of briefs submitted by the parties and *amici* has called to our attention even a single case in which a state court or federal court has approved of a State's addition of qualifications for a member of Congress. To the contrary, an impressive number of courts have determined that States lack the authority to add qualifications. See, e.g., *Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918); *Eckwall v. Stadelman*, 146 Ore. 439, 446, 30 P. 2d 1037, 1040 (1934); *Stockton v. McFarland*, 56 Ariz. 138, 144, 106 P. 2d 328, 330 (1940); *State ex rel. Johnson v. Crane*, 65 Wyo. 189, 197 P. 2d 864 (1948); *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (N.M. 1972); *Stack v. Adams*, 315 F. Supp. 1295, 1297-1298 (ND Fla. 1970); *Buckingham v. State*, 42 Del. 405, 35 A. 2d 903, 905 (1944); *Stumpf v. Lau*, 108 Nev. 826, 830, 839 P. 2d 120, 123 (1992); *Danielson v. Fitzsimmons*, 232 Minn. 149, 151, 44 N. W. 2d 484, 486 (1950); *In re Opinion of Judges*, 79 S. D. 585, 587, 116 N. W. 2d 233, 234 (1962). Courts have struck down state-imposed qualifications in the form of term limits, see, e.g., *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1081 (WD Wash. 1994); *Stumpf v. Lau*, 108 Nev., at 830, 839 P. 2d, at 123, district residency requirements, see, e.g., *Hellmann v. Collier*, 217 Md. 93, 100, 141 A. 2d 908, 911 (1958); *Dillon v. Fiorina*, 340 F. Supp., at 731; *Exon v. Tiemann*, 279 F. Supp. 609, 613 (Neb. 1968); *State ex rel. Chavez v. Evans*, 79 N. M. 578, 581, 446 P. 2d 445, 448 (1968) (*per curiam*), loyalty oath requirements, see, e.g., *Shub v. Simpson*, 196 Md. 177, 199, 76 A. 2d 332, 341, appeal dism'd, 340 U. S. 881 (1950); *In re O'Connor*, 173 Misc. 419, 421, 17 N. Y. S. 2d 758, 760 (Super. Ct. 1940), and restrictions on those convicted of felonies, see, e.g., *Application of Ferguson*, 57 Misc. 2d 1041, 1043, 294 N. Y. S. 2d 174, 176 (Super. Ct. 1968); *Danielson v. Fitzsimmons*, 232 Minn., at 151, 44 N. W. 2d, at 486; *State ex rel. Eaton v. Schmahl*, 140 Minn. 219, 220, 167 N. W. 481 (1918) (*per curiam*). Prior to *Powell*, the commentators were similarly unanimous. See, e.g., 1 W. Blackstone, *Commentaries Appendix* 213 (S. Tucker ed. 1803) ("[T]hese provisions, as they require qualifications which the constitution does not, may possibly be found to be nugatory"); 1 Story §627 (each member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states"); 1 J. Kent, *Commentaries on American Law* 228, n. a (3d ed. 1836) ("the objections to the existence of any such power [on the part of the States to add qualifications are]. . . too palpable and weighty to admit of any discussion"); G. McCrary, *American Law of Elections* §322 (4th ed. 1897) ("It is not competent for any State to add to or in any manner change the

qualifications for a Federal office, as prescribed by the Constitution or laws of the United States"); T. Cooley, *General Principles of Constitutional Law* 268 (2d ed. 1891) ("The Constitution and laws of the United States determine what shall be the qualifications for federal offices, and state constitutions and laws can neither add to nor take away from them"); C. Burdick, *Law of the American Constitution* 160 (1922) ("It is clearly the intention of the Constitution that all persons not disqualified by the terms of that instrument should be eligible to the federal office of Representative"); *id.*, at 165 ("It is as clear that States have no more right to add to the constitutional qualifications of Senators than they have to add to those for Representatives"); Warren 422 ("The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications").¹⁴ This impressive and uniform body of judicial decisions and learned commentary indicates that the obstacles confronting petitioners are formidable indeed.

Petitioners argue that the Constitution contains no express prohibition against state-added qualifications, and that Amendment 73 is therefore an appropriate exercise of a State's reserved power to place additional restrictions on the choices that its own voters may make. We disagree for two independent reasons. First, we conclude that the power to add qualifications is not within the "original powers" of the States, and thus is not reserved to the States by the Tenth Amendment. Second, even if States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for members of Congress, and that the Framers thereby "divested" States of any power to add qualifications.

The "plan of the convention" as illuminated by the historical materials, our opinions, and the text of the Tenth Amendment, draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." *Sturges v. Crowninshield*, 4 Wheat. 122, 193 (1819).

This classic statement by the Chief Justice endorsed Hamilton's reasoning in *The Federalist* No. 32 that the plan of the Constitutional Convention did not contemplate "[a]n entire consolidation of the States into one complete national sovereignty," but only a partial consolidation in which "the State governments would clearly retain all the rights of sovereignty which they

¹⁴More recently, the commentators have split, with some arguing that state-imposed term limits are constitutional, see, e.g., Gorsuch & Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitation*, 20 Hofstra L. Rev. 341 (1991); Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97 (1991); Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 Creighton L. Rev. 321 (1993), and others arguing that they are not, see, e.g., Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 Harv. J. L. & Pub. Policy 1 (1994); Eid & Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. L. Rev. 1 (1992); Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 Wash. L. Rev. 415 (1992).

before had, and which were not, by that act, *exclusively* delegated to the United States." The Federalist No. 32, at 198. The text of the Tenth Amendment unambiguously confirms this principle:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As we have frequently noted, "[t]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, *only to the extent that the Constitution has not divested them of their original powers* and transferred those powers to the Federal Government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549 (1985) (internal quotation marks and citation omitted) (emphasis added); see also *New York v. United States*, 505 U. S. — (slip op., at 8-9) (1992).

SOURCE OF THE POWER

Contrary to petitioners' assertions, the power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. As Justice Story recognized, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." 1 Story §627.

Justice Story's position thus echoes that of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In *McCulloch*, the Court rejected the argument that the Constitution's silence on the subject of state power to tax corporations chartered by Congress implies that the States have "reserved" power to tax such federal instrumentalities. As Chief Justice Marshall pointed out, an "original right to tax" such federal entities "never existed, and the question whether it has been surrendered, cannot arise." *id.*, at 430. See also *Crandall v. Nevada*, 6 Wall. 35, 46 (1868). In language that presaged Justice Story's argument, Chief Justice Marshall concluded: "This opinion does not deprive the States of any resources which they originally possessed." 4 Wheat., at 436.¹⁵

With respect to setting qualifications for service in Congress, no such right existed before the Constitution was ratified. The contrary argument overlooks the revolutionary character of the government that the Framers conceived. Prior to the adoption of the Constitution, the States had joined together under the Articles of Confederation. In that system, "the States retained most of their sovereignty, like independent nations bound together only by treaties." *Wesberry v. Sanders*, 376 U. S. 1, 9 (1964). After the Constitutional Convention convened, the Framers were presented with, and eventually adopted a variation of, "a plan not merely to

amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature." *Id.*, at 10. In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States. See, e. g., *FERC v. Mississippi*, 456 U. S. 742, 791 (1982) (O'CONNOR, J., concurring in the judgment in part and dissenting in part) ("The Constitution . . . permitt[ed] direct contact between the National Government and the individual citizen"). In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. . . . Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people." 1 Story §627. Representatives and Senators are as much officers of the entire union as is the President. States thus "have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union." *Ibid.*¹⁶

We believe that the Constitution reflects the Framers' general agreement with the approach later articulated by Justice Story. For example, Art. I, §5, cl. 1 provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." The text of the Constitution thus gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State. For this reason, the dissent falters when it states that "the people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress." *Post*, at 16.

Two other sections of the Constitution further support our view of the Framers' vision. First, consistent with Story's view, the Constitution provides that the salaries of representatives should "be ascertained by Law, and paid out of the Treasury of the United States," Art. I, §6, rather than by individual States. The salary provisions reflect the view that representatives owe their allegiance to the people, and not to States. Second, the provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States, namely that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof." This duty parallels the duty under Article II that "Each State shall appoint, in such Manner as the Legislature

¹⁵Thus, contrary to the dissent's suggestion, *post*, at 13, Justice Story was not the first, only, or even most influential proponent of the principle that certain powers are not reserved to the States despite constitutional silence. Instead, as Chief Justice Marshall's opinion in *McCulloch* reveals, that principle has been a part of our jurisprudence for over 175 years.

¹⁶The Constitution's provision for election of Senators by the state legislatures, see Art. I, §3, cl. 1, is entirely consistent with this view. The power of state legislatures to elect Senators comes from an express delegation of power from the Constitution, and thus was not at all based on some aspect of original state power. Of course, with the adoption of the Seventeenth Amendment, state power over the election of Senators was eliminated, and Senators, like Representatives, were elected directly by the people.

thereof may direct, a Number of Electors." Art II., §1, cl. 2. These Clauses are express delegations of power to the States to act with respect to federal elections.¹⁷

This conclusion is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution. Thus, we have noted that "[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by §2 of Art. I." *United States v. Classic*, 313 U. S. 299, 315 (1941). Cf. *Hawke v. Smith*, 253 U. S. 221 (1920) ("[T]he power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented").

In short, as the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution. Instead, any state power to set the qualifications for membership in Congress must derive not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty. In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist.

THE PRECLUSION OF STATE POWER

Even if we believed that States possessed as part of their original powers some control over congressional qualifications, the text and structure of the Constitution, the relevant historical materials, and, most importantly, the "basic principles of our democratic system" all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.

Much of the historical analysis was undertaken by the Court in *Powell*. See *supra*, at 9-12. There is, however, additional historical evidence that pertains directly to the power of States. That evidence, though perhaps not as extensive as that reviewed in *Powell*, leads unavoidably to the conclusion that the States lack the power to add qualifications.

The Convention and Ratification Debates

The available affirmative evidence indicates the Framers' intent that States have no role in the setting of qualifications. In Federalist Paper No. 52, dealing with the House of Representatives, Madison addressed the "qualifications of the electors and the elected." The Federalist No. 52, at 325. Madison first noted the difficulty in achieving uniformity in the qualifications for electors, which resulted in the Framers' decision to require only that the qualifications for federal electors be the same as those for state electors. Madison argued

that such a decision "must be satisfactory to every State, because it is comfortable to the standard already established, or which may be established, by the State itself." *Id.*, at 326. Madison then explicitly contrasted the state control over the qualifications of electors with the lack of state control over the qualifications of the elected:

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election be an inhabitant of the State he is to represent; and, during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Ibid.*¹⁸

Madison emphasized this same idea in Federalist 57:

"Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." The Federalist No. 57, at 351 (emphasis added).

¹⁸The dissent places a novel and implausible interpretation on this paragraph. Consistent with its entire analysis, the dissent reads Madison as saying that the sole purpose of the Qualifications Clause was to set minimum qualifications that would prevent the States from sending incompetent representatives to Congress; in other words, Madison viewed the Clause as preventing the States from opening the door to this part of the federal service too widely. See *post* at 60-62.

The text of Federalist No. 52 belies the dissent's reading. First, Madison emphasized that "[t]he qualifications of the elected . . . [were] more susceptible of uniformity." His emphasis on uniformity would be quite anomalous if he envisioned that States would create for their representatives a patchwork of qualifications. Second, the idea that Madison was in fact concerned that States would open the doors to national service too widely is entirely inconsistent with Madison's emphasizing that the Constitution kept "the door . . . open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." The Federalist No. 52, at 326.

Finally the dissent argues that "Madison could not possibly have been rebuking the States for setting unduly high qualifications for their representatives in Congress," *post*, at 61, and suggests that Madison's comments do not reflect "an implicit criticism of the States for setting unduly high entrance barriers," *post*, at 62. We disagree. Though the dissent attempts to minimize the extensiveness of state-imposed qualifications by focusing on the qualifications that States imposed on delegates to Congress and the age restrictions that they imposed on state legislators, the dissent neglects to give appropriate attention to the abundance of property, religious, and other qualifications that States imposed on state elected officials. As we describe in some detail, *infra*, at 45-49, nearly every State had property qualifications, and many States had religious qualifications, term limits, or other qualifications. As Madison surely recognized, without a constitutional prohibition, these qualifications could be applied to federal representatives. We cannot read Madison's comments on the "open door" of the Federal Government as anything but a rejection of the "unduly high" barriers imposed by States.

¹⁷The Clauses also reflect the idea that the Constitution treats both the President and Members of Congress as federal officers.

The provisions in the Constitution governing federal elections confirm the Framers' intent that States lack power to add qualifications. The Framers feared that the diverse interests of the States would undermine the National Legislature, and thus they adopted provisions intended to minimize the possibility of state interference with federal elections. For example, to prevent discrimination against federal electors, the Framers required in Art. I, §2, cl. 1, that the qualifications for federal electors be the same as those for state electors. As Madison noted, allowing States to differentiate between the qualifications for state and federal electors "would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone." The Federalist No. 52, at 326. Similarly, in Art. I, §4, cl. 1, though giving the States the freedom to regulate the "Times, Places and Manner of holding Elections," the Framers created a safeguard against state abuse by giving Congress the power to "by Law make or alter such Regulations." The Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the "Times, Places and Manner" of elections. Madison noted that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power." 2 Farrand 240. Gouverneur Morris feared "that the States might make false returns and then make no provisions for new elections." *Id.*, at 241. When Charles Pinckney and John Rutledge moved to strike the congressional safeguard, the motion was soundly defeated. *Id.*, at 240-241. As Hamilton later noted: "Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." The Federalist No. 59, at 363. See also *ibid.* (one justification for Times, Places and Manner Clause is that "[i]f we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government").¹⁹

The Framers' discussion of the salary of representatives reveals similar concerns. When the issue was first raised, Madison argued that congressional compensation should be fixed in the Constitution, rather than left to state legislatures, because otherwise "it would create an improper dependence." 1 Farrand 216. George Mason agreed, noting that "the parsimony of the States might reduce the provision so low that . . . the question would be not who were most fit to be chosen, but who were most willing to serve." *Ibid.*

When the issue was later reopened, Nathaniel Gorham stated that he "wished not to refer the matter to the

State Legislatures who were always paring down salaries in such a manner as to keep out of offices men most capable of executing the functions of them." *Id.*, at 372. Edmund Randolph agreed that "[i]f the States were to pay the members of the Nat[ional] Legislature, a dependence would be created that would vitiate the whole System." *Ibid.* Rufus King "urged the danger of creating a dependence on the States," *ibid.*, and Hamilton noted that "[t]hose who pay are the masters of those who are paid," *id.*, at 373. The Convention ultimately agreed to vest in Congress the power to set its own compensation. See Art. I, §6.²⁰

In light of the Framers' evident concern that States would try to undermine the National Government, they could not have intended States to have the power to set qualifications. Indeed, one of the more anomalous consequences of petitioners' argument is that it accepts federal supremacy over the procedural aspects of determining the times, places, and manner of elections while allowing the states *carte blanche* with respect to the substantive qualifications for membership in Congress.

The dissent nevertheless contends that the Framers' distrust of the States with respect to elections does not preclude the people of the States from adopting eligibility requirements to help narrow their own choices. See *post*, at 47-48. As the dissent concedes, *post*, at 53, however, the Framers were unquestionably concerned that the States would simply not hold elections for federal officers, and therefore the Framers gave Congress the power to "make or alter" state election regulations. Yet under the dissent's approach, the States could achieve exactly the same result by simply setting qualifications for federal office sufficiently high that no one could meet those qualifications. In our view, it is inconceivable that the Framers would provide a specific constitutional provision to ensure that federal elections would be held while at the same time allowing States to render those elections meaningless by simply ensuring that no candidate could be qualified for office. Given the Framers' wariness over the potential for state abuse, we must conclude that the specification of fixed qualifications in the constitutional text was intended to prescribe uniform rules that would preclude modification by either Congress or the States.²¹

We find further evidence of the Framers' intent in Art. I, §5, cl. 1, which provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." That Art. I, §5 vests a federal tribunal

²⁰The Framers' decision to reject a proposal allowing for States to recall their own representatives, see 1 Farrand 20, 217, reflects these same concerns.

¹⁹The dissent attacks our holding today by arguing that the Framers' distrust of the States extended only to measures adopted by "state legislatures," and not to measures adopted by "the people themselves." *Post*, at 48. See also *ibid.* ("These delegates presumably did not want state legislatures to be able to tell Members of Congress from their State how to vote") (emphasis added). The novelty and expansiveness of the dissent's attack is quite astonishing. We are aware of no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly through amendment of the state constitution. Indeed, no party has so argued. Quite simply, in our view, the dissent's distinction between state legislation passed by the state legislature and legislation passed by state constitutional amendment is untenable. The qualifications in the Constitution are fixed, and may not be altered by either States or their legislatures.

²¹The dissent's arguments concerning these provisions of the Constitution, see *post*, at 48-53, simply reinforce our argument that the constitutional provisions surrounding elections all reveal the Framers' basic fear that the States might act to undermine the National Legislature. For example, as the dissent concedes, the Framers' feared that States would use the control over salaries to influence the votes of their representative. See *post*, at 48-49. Similarly, the dissent concedes that the Times, Places and Manner Clause reflects the Framers' fear that States would not conduct federal elections at all. See *post*, at 53. We believe that the dissent's reading of the provisions at issue understates considerably the extent of the Framers' distrust. However, even under the dissent's reading of the provisions, the text of the Constitution unquestionably reveals the Framers' distrust of the States regarding elections, and thus provides powerful evidence supporting our view that the qualifications established in the Constitution are exclusive.

with ultimate authority to judge a Member's qualifications is fully consistent with the understanding that those qualifications are fixed in the Federal Constitution, but not with the understanding that they can be altered by the States. If the States had the right to prescribe additional qualifications—such as property, educational, or professional qualifications—for their own representatives, state law would provide the standard for judging a Member's eligibility. As we concluded in *Murdock v. Memphis*, 20 Wall. 590 (1875), federal questions are generally answered finally by federal tribunals because rights which depend on federal law "should be the same everywhere" and "their construction should be uniform." *Id.*, at 632. The judging of questions concerning rights which depend on state law is not, however, normally assigned to federal tribunals. See *id.*, at 636. The Constitution's provision for each House to be the judge of its own qualifications thus provides further evidence that the Framers believed that the primary source of those qualifications would be federal law.

We also find compelling the complete absence in the ratification debates of any assertion that States had the power to add qualifications. In those debates, the question whether to require term limits, or "rotation," was a major source of controversy. The draft of the Constitution that was submitted for ratification contained no provision for rotation.²² In arguments that echo in the preamble to Arkansas' Amendment 73, opponents of ratification condemned the absence of a rotation requirement, noting that "there is no doubt that senators will hold their office perpetually; and in this situation, they must of necessity lose their dependence, and their attachments to the people."²³ Even proponents of ratification expressed concern about the "abandonment in every instance of the necessity of rotation in office."²⁴ At several ratification conventions, partici-

pants proposed amendments that would have required rotation.²⁵

The Federalists' responses to those criticisms and proposals addressed the merits of the issue, arguing that rotation was incompatible with the people's right to choose. As we noted above, Robert Livingston argued:

"The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism." 2 Elliot's Debates 292-293.

Similarly, Hamilton argued that the representatives' need for reelection rather than mandatory rotation was the more effective way to keep representatives responsive to the people, because "[w]hen a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument." *Id.*, at 320.²⁶

Regardless of which side has the better of the debate over rotation, it is most striking that nowhere in the extensive ratification debates have we found any statement by either a proponent or an opponent of rotation that the draft constitution would permit States to require rotation for the representatives of their own citizens. If the participants in the debate had believed that the States retained the authority to impose term limits, it is inconceivable that the Federalists would not have made this obvious response to the arguments of the pro-rotation forces. The absence in an otherwise freewheeling debate of any suggestion that States had the power to impose additional qualifications unquestionably reflects the Framers' common understanding that States lacked that power.

In short, if it had been assumed that States could add additional qualifications, that assumption would have provided the basis for a powerful rebuttal to the arguments being advanced. The failure of intelligent and experienced advocates to utilize this argument must reflect a general agreement that its premise was unsound, and that the power to add qualifications was one that the Constitution denied the States.²⁷

²² A proposal requiring rotation for members of the House was proposed at the Convention, see 1 Farrand 20, but was defeated unanimously, see *id.*, at 217. There is no record of any debate on either occasion.

²³ 2 Elliot's Debates 309-310 (N. Y., Smith). See also *id.*, at 287-288 (N. Y., G. Livingston) (Senators will enjoy "a security of their re-election, as long as they please. . . . In such a situation, men are apt to forget their dependence, lose their sympathy, and contract selfish habits. . . . The senators will associate only with men of their own class, and thus become strangers to the condition of the common people"); *id.*, at 30-31 (Mass., Turner) ("Knowing the numerous arts, that designing men are prone to, to secure their election, and perpetuate themselves, it is my hearty wish that a rotation may be provided for"); *id.*, at 62 (Mass., Kingsley) ("[W]e are deprived of annual elections, have no rotation, and cannot recall our members; therefore our federal rulers will be masters, and not servants"); Samuel Bryan, "Centinel I," *Independent Gazetteer* (Phil., Oct. 5, 1787), 1 Debate on the Constitution 52, 61 (B. Bailyn ed. 1990) (hereinafter Bailyn) ("as there is no exclusion by rotation, [Senators] may be continued for life, which, from their extensive means of influence, would follow of course"); Letter from George Lee Turberville to Madison (Dec. 11, 1787), 1 Bailyn 477, 479 ("Why was not that truly republican mode of forcing the Rulers or sovereigns of the states to mix after stated Periods with the people again—observed"); Mercy Otis Warren, "A Columbian Patriot" (Boston, Feb. 1788), 2 Bailyn 284, 292 ("There is no provision for a rotation, nor any thing to prevent the perpetuity of office in the same hands for life. . . . By this neglect we lose the advantages of that check to the overbearing insolence of office, which by rendering him ineligible at certain periods, keeps the mind of man in equilibrium, and teaches him the feelings of the governed").

²⁴ Letter of December 20, 1787 from Thomas Jefferson to James Madison. 1 *id.*, at 209, 211. In 1814, in another private letter, Jefferson expressed the opinion that the States had not abandoned

the power to impose term limits. See Letter of Jan. 31, 1814 to Joseph C. Cabell, in 14 Writings of Thomas Jefferson 82 (A. Lipscomb ed. 1904). Though he noted that his reasoning on the matter "appears to me to be sound," he went on to note:

"but, on so recent a change of view, caution requires us not to be too confident, and that we admit this to be one of the doubtful questions on which honest men may differ with the purest of motives; and the more readily, as we find we have differed from ourselves on it." *Id.*, at 83.

The text of Jefferson's response clearly belies the dissent's suggestion that Jefferson "himself did not entertain serious doubts of its correctness." *Post*, at 32, n. 14.

²⁵ See n. 40, *infra*.

²⁶ George Washington made a similar argument:

"The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled." 1 Bailyn 305, 306-307.

²⁷ Petitioners set forth several other arguments to support their contention that the Convention and ratification debates reveal that the qualifications in the Qualifications Clauses were not intended to be exclusive. We find none of these persuasive.

Petitioners first observe that the notes of Edmund Randolph, who was a member of the Committee of Detail, reveal that an early draft of the Qualifications Clause provided:

"The qualifications of (a) delegates shall be the age of twenty-five years at least, and citizenship: (and any person possessing these

Congressional Experience

Congress' subsequent experience with state-imposed qualifications provides further evidence of the general consensus on the lack of state power in this area. In *Powell*, we examined that experience and noted that during the first 100 years of its existence, "Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution." 395 U. S., at 542. Congress first confronted the issue in 1807 when it faced a challenge to the qualifications of William McCreery, a Representative from Maryland who allegedly did not satisfy a residency requirement imposed by that State. In recommending that McCreery be seated, the Report of the House Committee on Elections noted:

"The committee proceeded to examine the Constitution, with relation to the case submitted to them, and find that *qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications*; and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably to the Constitutional rules" *Powell*, 395 U. S., at 542, quoting 17 Annals of Cong. 871 (1807) (emphasis added).²⁸

qualifications may be elected except)." 2 Farrand 139 (footnote omitted).

Petitioners suggest that the deletion of the parenthetical material from the Clause suggests that the Framers did not intend the Qualifications Clause to be exclusive. We reject this argument. First, there is no evidence that the draft in Randolph's notes was ever presented to the Convention, and thus the deletion of the Clause tells us little about the views of the Convention as a whole. Moreover, even assuming that the Convention had seen the draft, the deletion of the language without comment is at least as consistent with a belief—as suggested by Dickinson, see n. 9, *supra*—that the language was superfluous as with a concern that the language was inappropriate. Finally, contrary to the rather ingenious argument advanced in the dissent, see *post* at 46, it seems to us irrelevant that the draft in question did not include a comparable parenthetical clause referring to "elected" Senators because the draft contemplated that senators, unlike Representatives, would not be chosen by popular election.

Nor is there merit to the argument that the inclusion in the Committee's final draft of a provision allowing each House to add property qualifications, see 2 Farrand 179, is somehow inconsistent with our holding today. First, there is no conflict between our holding that the qualifications for Congress are fixed in the Constitution and a provision in the Constitution itself providing for property qualifications. Indeed, that is why our analysis is consistent with the other disqualifications contained in the Constitution itself. See n. 2, *supra*. The Constitution simply prohibits the imposition by either States or Congress of additional qualifications that are not contained in the text of the Constitution. Second, of course, the property provision was deleted, thus providing further evidence that the Framers wanted to minimize the barriers that would exclude the most able citizens from service in the National government.

Respondent Republican Party of Arkansas also argues that the negative phrasing of the Qualifications Clauses suggests that they were not meant to be exclusive. Brief for Respondents Republican Party of Arkansas *et al.* 5-6. This argument was firmly rejected in *Powell*, see 395 U. S., at 537-539, and n. 73; see also Warren 422, n. 1, and we see no need to revisit it now.

²⁸We recognize that the "Committee of Elections were not unanimous in these sentiments," and that a "minority advocated the right of the State Legislature to prescribe additional qualifications to the members from the respective States." 17 Annals of Cong. 873 (1807).

The Chairman of the House Committee on Elections elaborated during debate:

"The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them." *Powell*, 395 U. S., at 542-543, quoting from 17 Annals of Cong. 872 (1807):

As we noted in *Powell*, the congressional debate over the Committee's recommendation tended to focus on the "narrow issue of the power of the States to add to the standing qualifications set forth in the Constitution," 395 U. S., at 543. The whole House, however, did not vote on the Committee's report, and instead voted only on a simple resolution: "Resolved, That William McCreery is entitled to his seat in this House." 17 Annals of Cong. 1238 (1807). That resolution passed by a vote of 89 to 18. *Ibid*.

Though the House Debate may be inconclusive, commentators at the time apparently viewed the seating of McCreery as confirmation of the States' lack of power to add qualifications. For example, in a letter to Joseph Cabell, Thomas Jefferson noted the argument that "to add new qualifications to those of the Constitution would be as much an alteration as to detract from them"; he then added: "And so I think the House of Representatives of Congress decided in some case; I believe that of a member from Baltimore." Letter of Jan. 31, 1814 to Joseph C. Cabell, in 14 Writings of Thomas Jefferson 82 (A. Lipscomb ed. 1904).

Similarly, for over 150 years prior to *Powell*, commentators viewed the seating of McCreery as an expression of the view of the House that States could not add to the qualifications established in the Constitution. Thus, for example, referring to the McCreery debates, one commentator noted, "By the decision in this case, [and that in another contested election], it seems to have been settled that the States have not a right to require qualifications from members, different from, or in addition to, those prescribed by the constitution." Cases of Contested Elections in Congress 171 (M. Clarke & D. Hall eds. 1834) (emphasis in original). Other commentators viewed the incident similarly. See, e.g., G. Paschal, *The Constitution of the United States* 66 (1876) (citing McCreery to support the proposition that "[t]he Constitution having fixed the qualifications of members, no additional qualifications can rightfully be required by the States") (emphasis in original); G. McCrary, *American Law of Elections* §323 (4th ed. 1897) (citing McCreery and stating "A state law requiring that a Representative in Congress shall reside in a particular town and country within the district from which he is chosen is unconstitutional and void"); W. Sutherland, *Notes on the Constitution of the United States* 40 (1904) (citing McCreery to support statement that "[t]his clause fixes the qualifications of members so far as state action is concerned, and no additional qualifications can be required by the state"); C. Burdick, *Law of the American Constitution* 160 (1922) (citing McCreery to support the proposition that state-imposed "limitations have been held . . . not to be effective"). Finally, it is clear that in *Powell* we viewed the seating of McCreery as the House's acknowledgment that the qualifications in the Constitution were fixed. See 395 U. S., at 542-543.

The Senate experience with state-imposed qualifications further supports our conclusions. In 1887, for example, the Senate seated Charles Faulkner of West Virginia, despite the fact that a provision of the West Virginia Constitution purported to render him ineligible to serve. The Senate Committee on Privileges and Elections unanimously concluded that "no State can prescribe any qualification to the office of United States Senator in addition to those declared in the Constitution of the United States." S. Rep. No. 1, 50th Cong., 1st Sess., 4 (1887). The Senate Committee on Rules and Administration reached the same conclusion in 1964 when faced with a challenge to Pierre Salinger, who had been appointed to serve as Senator from California. See S. Rep. No. 1381, 88th Cong., 2d Sess., 5 ("It is well settled that the qualifications established by the U. S. Constitution for the office of U. S. Senator are exclusive, and a State cannot, by constitutional or statutory provisions, add to or enlarge upon those qualifications").

We recognize, as we did in *Powell*, that "congressional practice has been erratic"²⁹ and that the precedential value of congressional exclusion cases is "quite limited." *Powell*, 395 U. S., at 545-546. Nevertheless, those incidents lend support to the result we reach today.

Democratic Principles

Our conclusion that States lack the power to impose qualifications vindicates the same "fundamental principle of our representative democracy" that we recognized in *Powell*, namely that "the people should choose whom they please to govern them." *Id.*, at 547 (internal quotation marks omitted).

As we noted earlier, the *Powell* Court recognized that an egalitarian ideal—that election to the National Legislature should be open to all people of merit—provided a critical foundation for the Constitutional structure. This egalitarian theme echoes throughout the constitutional debates. In *The Federalist* No. 57, for example, Madison wrote:

"Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." *The Federalist* No. 57, at 351.

Similarly, hoping to persuade voters in New York that the Constitution should be ratified, John Stevens, Jr., wrote: "[N]o Government, that has ever yet existed in the world, affords so ample a field, to individuals of all ranks, for the display of political talents and abilities. . . . No man who has real merit, let his situation be what it will, need despair." 1 *Bailyn* 487, 492. And Timothy Pickering noted that, "while several of the state constitutions prescribe certain degrees of property as indispensable qualifications for offices, this which is proposed for the U. S. throws the door wide open for the entrance of every man who enjoys the confidence of his fellow citizens." Letter from T. Pickering to C. Tillinghast (Dec. 24, 1787), 1 *Bailyn* 289, 290 (emphasis in original).³⁰ Additional qualifications pose the same

obstacle to open elections whatever their source. The egalitarian ideal, so valued by the Framers, is thus compromised to the same degree by additional qualifications imposed by States as by those imposed by Congress.

Similarly, we believe that state-imposed qualifications, as much as congressionally imposed qualifications, would undermine the second critical idea recognized in *Powell*: that an aspect of sovereignty is the right of the people to vote for whom they wish. Again, the source of the qualification is of little moment in assessing the qualification's restrictive impact.

Finally, state-imposed restrictions, unlike the congressionally imposed restrictions at issue in *Powell*, violate a third idea central to this basic principle: that the right to choose representatives belongs not to the States, but to the people. From the start, the Framers recognized that the "great and radical vice" of the Articles of Confederation was "the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." *The Federalist* No. 15, at 108 (Hamilton). Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people. See, e. g., *supra*, at 22-23. The Framers implemented this ideal most clearly in the provision, extant from the beginning of the Republic, that calls for the Members of the House of Representatives to be "chosen every second Year by the People of the several States." Art. I, §2, cl. 1. Following the adoption of the 17th Amendment in 1913, this ideal was extended to elections for the Senate. The Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people. As Chief Justice John Marshall observed: "The government of the union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch v. Maryland*, 4 Wheat., at 404-405.³¹ Ours is a "government of the people, by the people, for the people." A. Lincoln, Gettysburg Address (1863).

The Framers deemed this principle critical when they discussed qualifications. For example, during the debates on residency requirements, Morris noted that in the House, "the people at large, not the States, are represented." 2 *Farrand* 217 (emphasis in original) (footnote omitted). Similarly, George Read noted that

wards") (*Dickinson*); *The Federalist* No. 36, at 217 ("There are strong minds in every walk of life that will rise superior to the disadvantages of situation and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all") (Hamilton); N. Webster, "A Citizen of America," (*Phil.*, Oct. 17, 1787), 1 *Bailyn* 129, 142 ("Money is not made a requisite—the places of senators are wisely left open to all persons of suitable age and merit").

³¹Cf. *Hawke v. Smith*, 253 U. S. 221, 226 (1920) ("The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States"). Compare U. S. Const., Preamble ("We the People") with *The Articles of Confederation*, reprinted in 2 *Bailyn* 926 ("we the under signed Delegates of the States").

²⁹See, e. g., *Powell*, 395 U. S., at 544-546 (noting examples).

³⁰See also 2 *Farrand* 123 (it is "improper that any man of merit should be subjected to disabilities in a Republic where merit was understood to form the great title to public trust, honors & re-

the Framers "were forming a *Nati[on]al Gov[ernment]* and such a regulation would correspond little with the idea that we were one people." *Ibid.* (Emphasis in original.) James Wilson "enforced the same consideration." *Ibid.*

Consistent with these views, the constitutional structure provides for a uniform salary to be paid from the national treasury, allows the States but a limited role in federal elections, and maintains strict checks on state interference with the federal election process. The Constitution also provides that the qualifications of the representatives of each State will be judged by the representatives of the entire Nation. The Constitution thus creates a uniform national body representing the interests of a single people.

Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure. *Cf. McCulloch v. Maryland*, 4 Wheat., at 428-429 (1819) ("Those means are not given by the people of a particular State, not given by the constituents of the legislature, . . . but by the people of all the States. They are given by all, for the benefit of all—and upon theory should be subjected to that government only which belongs to all"). Such a patchwork would also sever the direct link that the Framers found so critical between the National Government and the people of the United States.³²

State Practice

Petitioners attempt to overcome this formidable array of evidence against the States' power to impose qualifications by arguing that the practice of the States immediately after the adoption of the Constitution demonstrates their understanding that they possessed such power. One may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States, especially when no court has ever upheld a state-imposed qualification of any sort. See *supra*, at 18-19. But petitioners' argument is unpersuasive even on its own terms. At the time of the Convention, "[a]lmost all

the State Constitutions required members of their Legislatures to possess considerable property." See Warren 416-417.³³ Despite this near uniformity, only one State, Virginia, placed similar restrictions on members of Congress, requiring that a representative be, *inter alia*, a "freeholder." See 1788 Va. Acts, ch. 2, §2.³⁴ Just 15 years after imposing a property qualification, Virginia replaced that requirement with a provision requiring that representatives be only "qualified according to the constitution of the United States." 1813 Va. Acts, ch. 23, §2. Moreover, several States, including New Hampshire, Georgia, Delaware, and South Carolina, revised their Constitutions at around the time of the Federal Constitution. In the revised Constitutions, each State retained property qualifications for its own state elected officials yet placed no property qualification on its congressional representatives.³⁵

³²See, e.g., 7 Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies 3816 (F. Thorpe ed. 1909) (hereinafter Thorpe) (Virginia) (members of state legislature must be freeholders); 4 *id.*, at 2460, 2461 (New Hampshire) (freehold estate of 200 pounds for state senators; estate of 100 pounds, at least half of which is freehold, for state representatives); 3 *id.*, at 1691, 1694 (Maryland) (real and personal property of over 500 pounds for House of Delegates; real and personal property of 1000 pounds for Senate); *id.*, at 1897, 1898 (freehold estate of 300 pounds or personal estate of 600 pounds for State Senators; freehold estate of 100 pounds or ratable estate of 200 pounds for State Representatives); 1 *id.*, at 562 (Delaware) (state legislators must be freeholders); 5 *id.*, at 2595 (New Jersey) (Members of Legislative Council must be freeholders and must have real and personal property of 1,000 pounds; Members of Assembly must have real and personal property of 500 pounds); *id.*, at 2631 (New York) (state senators must be freeholders); *id.*, at 2790 (North Carolina) (100 acres of land for House; 300 acres of land in Senate); 2 *id.*, at 779 (Georgia) (150 acres of land or property of 250 pounds); 6 *id.*, at 3251 (South Carolina) (freehold estate of 2,000 pounds for state senate).

³³Judge Tucker expressed doubt about the constitutionality of the provisions of the Virginia statute, noting that "these provisions, as they require qualifications which the constitution does not, may possibly be found to be nugatory." 1 W. Blackstone, Commentaries Appendix 213 (S. Tucker ed. 1803). Judge Tucker noted the two primary arguments against the power to add such a qualification:

"First, that in a representative government, the people have an undoubted right to judge for themselves of the qualification of their delegate, and if their opinion of the integrity of their representative will supply the want of estate, there can be no reason for the government to interfere, by saying, that the latter shall overbalance the former.

"Secondly; by requiring a qualification in estate it may often happen, that men the best qualified in other respects might be incapacitated from serving their country." *Ibid.*

³⁴See 4 Thorpe 2477, 2479 (New Hampshire) (100 pounds for House; 200 pounds for Senate); 2 *id.*, at 786 (Georgia) (200 acres of land or 150 pounds for House; 250 acres of land or 250 pounds for Senate); 6 *id.*, at 3259 (South Carolina) (500 acres and 10 slaves or 150 pounds sterling for House; 300 pounds sterling for Senate); 1 *id.*, at 570, 571 (Delaware) (freehold for House; freehold estate of 200 acres or real and personal property of 1,000 pounds for Senate). Pennsylvania amended its Constitution in 1790. Neither the old constitution nor the amended one contained property qualifications for state representatives. See 5 *id.*, at 3084; *id.*, at 3092-3093.

Several State Constitutions also imposed religious qualifications on state representatives. For example, New Hampshire's Constitution of 1784 and its Constitution of 1792 provided that members of the State Senate and House of Representatives be "of the protestant religion." 4 *id.*, at 2460, 2461-2462 (1784 Constitution); *id.*, at 2477, 2479 (1792 Constitution). North Carolina's Constitution provided that "no clergyman, or preacher of the gospel, of any denomination, shall be capable of being a member of either the Senate, House of Commons, or Council of State," 5 *id.*, at 2793, and that "no person, who shall deny the being of God or the truth of the Protestant religion . . . shall be capable of holding any office or

³²There is little significance to the fact that Amendment 73 was adopted by a popular vote, rather than as an act of the state legislature. See n. 19, *supra*. In fact, none of the petitioners argues that the constitutionality of a state law would depend on the method of its adoption. This is proper, because the voters of Arkansas, in adopting Amendment 73, were acting as citizens of the State of Arkansas, and not as citizens of the National Government. The people of the State of Arkansas have no more power than does the Arkansas Legislature to supplement the qualifications for service in Congress. As Chief Justice Marshall emphasized in *McCulloch*, "Those means are not given by the people of a particular State, not given by the constituents of the legislature, . . . but by the people of all the States." 4 Wheat., at 428-429.

The dissent concedes that the people of the Nation have an interest in preventing any State from sending "immature, disloyal, or unknowledgeable representatives to Congress," *post*, at 26, but does not explain why the people of the Nation lack a comparable interest in allowing every State to send mature, loyal, and knowledgeable representatives to Congress. In our view, the interest possessed by the people of the Nation and identified by the dissent is the same as the people's interest in making sure that, within "reasonable limitations, the door to this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." The Federalist No. 52, at 326.

The contemporaneous state practice with respect to term limits is similar. At the time of the Convention, States widely supported term limits in at least some circumstances. The Articles of Confederation contained a provision for term limits.³⁶ As we have noted, some members of the Convention had sought to impose term limits for Members of Congress.³⁷ In addition, many States imposed term limits on state officers,³⁸ four placed limits on delegates to the Continental Congress,³⁹ and several States voiced support for term limits for Members of Congress.⁴⁰ Despite this widespread support, no State sought to impose any term limits on its own federal representatives. Thus, a proper assessment of contemporaneous state practice provides further persuasive evidence of a general understanding that the qualifications in the Constitution were unalterable by the States.⁴¹

place of trust or profit in the civil department within this State," *ibid.* Georgia and South Carolina also had religious qualifications in their Constitutions for state legislators, see 2 *id.*, at 779 (Georgia) ("of the Protestant religion"); 6 *id.*, at 3252 (South Carolina) (must be "of the Protestant religion"), but deleted those provisions when they amended their Constitutions, in 1789, see 2 *id.*, at 785, and in 1790, see 6 *id.*, at 3258, respectively. Article VI of the Federal Constitution, however, prohibited States from imposing similar qualifications on federal legislators.

³⁶See 2 Bailyn 926, 927 ("[N]o person shall be capable of being a delegate for more than three years in any term of six years").

³⁷See 1 Farrand 20 ("Resolved) that the members of the first branch of the National Legislature ought . . . to be incapable of re-election for the space of [blank] after the expiration of their term of service"). See also n. 22, *supra*.

³⁸See, e.g., G. Wood, *Creation of the American Republic, 1776-1787*, p. 140 (1969) (noting that seven of the ten State Constitutions drafted in 1776-1777 provided for term limits on their state executives); see also App. to Brief for State Petitioner 1b-34b (describing provisions of State Constitutions).

³⁹3 Thorpe 1695-1697 (Maryland); 4 *id.*, at 2467 (New Hampshire); 5 *id.*, at 3085 ((Pennsylvania); 5 *id.*, at 2793 (North Carolina).

⁴⁰New York attached to its ratification a list of proposed amendments and "enjoin[ed] it upon their representatives in Congress to exert all their influence, and use all reasonable means, to obtain a ratification." 1 Elliot's Debates 329. One of the proposed amendments was "That no person be eligible as a senator for more than six years in any term of twelve years." *Id.*, at 330. In Virginia, the Convention similarly "enjoin[ed] it upon their representatives," 2 Bailyn 564, to adopt "a Declaration or Bill of Rights," *id.*, at 558, which would include the statement that members of the Executive and Legislative Branches "should, at fixed periods, be reduced to a private station, return into the mass of the people; and the vacancies be supplied by certain and regular elections; in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of Government, and the laws shall direct," *id.*, at 559. The North Carolina convention proposed nearly identical language, see *id.*, at 566, though that Convention ultimately did not ratify the Constitution, see 4 Elliot's Debates 250-251. Thus, at least three states proposed some form of constitutional amendment supporting term limits for Members of Congress.

⁴¹Petitioners and the dissent also point out that Georgia, Maryland, Massachusetts, Virginia, and North Carolina added district residency requirements, and petitioners note that New Jersey and Connecticut established nominating processes for congressional candidates. They rely on these facts to show that the States believed they had the power to add qualifications. We again are unpersuaded. First, establishing a nominating process is no more setting a qualification for office than is creating a primary. Second, it seems to us that States may simply have viewed district residency requirements as the necessary analog to state residency requirements. Thus state practice with respect to residency requirements does not necessarily indicate that States believed that they had a broad power to add restrictions. Finally, we consider the number of state-imposed qualifications to be remarkably small. Despite the

In sum, the available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution and recognized by this Court in *Powell*, reveal the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution.

IV.

Petitioners argue that, even if States may not add qualifications, Amendment 73 is constitutional because it is not such a qualification, and because Amendment 73 is a permissible exercise of state power to regulate the "Times, Places and Manner of Holding Elections." We reject these contentions.

Unlike §§1 and 2 of Amendment 73, which create absolute bars to service for long-term incumbents running for state office, §3 merely provides that certain Senators and Representatives shall not be certified as candidates and shall not have their names appear on the ballot. They may run as write-in candidates and, if elected, they may serve. Petitioners contend that only a legal bar to service creates an impermissible qualification, and that Amendment 73 is therefore consistent with the Constitution.

Petitioners support their restrictive definition of qualifications with language from *Storer v. Brown*, 415 U.S. 724 (1974), in which we faced a constitutional challenge to provisions of the California Elections Code that regulated the procedures by which both independent candidates and candidates affiliated with qualified political parties could obtain ballot position in general elections. The Code required candidates affiliated with a qualified party to win a primary election, and required independents to make timely filing of nomination papers signed by at least 5% of the entire vote cast in the last general election. The Code also denied ballot position to independents who had voted in the most recent primary election or who had registered their affiliation with a qualified party during the previous year.

In *Storer*, we rejected the argument that the challenged procedures created additional qualifications as

array of property, religious, and other qualifications that were contained in State Constitutions, petitioners and the dissent can point to only one instance of a state-imposed property qualification on candidates for Congress, and five instances of district residency requirements. The state practice seems to us notable for its restraint, and thus supports the conclusion that States did not believe that they generally had the power to add qualifications.

Nor are we persuaded by the more recent state practice involving qualifications such as those that bar felons from being elected. As we have noted, the practice of States is a poor indicator of the effect of restraints on the States, and no court has ever upheld one of these restrictions. Moreover, as one moves away from 1789, it seems to us that state practice is even less indicative of the Framers' understanding of state power.

Finally, it is important to reemphasize that the dissent simply has no credible explanation as to why almost every State imposed property qualifications on state representatives but not on federal representatives. The dissent relies first on the obvious but seemingly irrelevant proposition that the state legislatures were larger than state congressional delegations. *Post*, at 74, n. 37. If anything, the smaller size of the congressional delegation would have made States more likely to put qualifications on federal representatives since the election of any "pauper" would have had proportionally greater significance. The dissent also suggests that States failed to add qualifications out of fear that others, e.g., Congress, believed that States lacked the power to add such qualifications. Of course, this rationale is perfectly consistent with our view that the general understanding at the time was that States lacked the power to add qualifications.

"wholly without merit." *Id.*, at 746, n. 16. We noted that petitioners "would not have been disqualified had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election." *Ibid.* We concluded that the California Code "no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support." *Ibid.* See also *Joyner v. Mofford*, 706 F. 2d, at 1531; *Hopmann v. Connolly*, 746 F. 2d 97, 103 (CA1 1984), vacated in part on other grounds, 471 U. S. 459 (1985). Petitioners maintain that, under *Storer*, Amendment 73 is not a qualification.

We need not decide whether petitioners' narrow understanding of qualifications is correct because, even if it is, Amendment 73 may not stand. As we have often noted, "[c]onstitutional rights would be of little value if they could be . . . indirectly denied." *Harman v. Forssenius*, 380 U. S. 528, 540 (1965), quoting *Smith v. Allwright*, 321 U. S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on Constitutional protections. *Lane v. Wilson*, 307 U. S. 268, 275 (1939); *Harman v. Forssenius*, 380 U. S., at 540-541.

In our view, Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly. As the plurality opinion of the Arkansas Supreme Court recognized, Amendment 73 is an "effort to dress eligibility to stand for Congress in ballot access clothing," because the "intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." 316 Ark., at 266, 872 S. W. 2d, at 357.⁴² We must, of course, accept the State Court's view of the purpose of its own law: we are thus authoritatively informed that the sole purpose of §3 of Amendment 73 was to attempt to achieve a result that is forbidden by the Federal Constitution. Indeed, it cannot be seriously contended that the intent behind Amendment 73 is other than to prevent the election of incumbents. The preamble of Amendment 73 states explicitly: "[T]he people of Arkansas . . . herein limit the terms of elected officials." Sections 1 and 2 create absolute limits on the number of terms that may be served. There is no hint that §3 was intended to have any other purpose.

Petitioners do, however, contest the Arkansas Supreme Court's conclusion that the Amendment has the same practical effect as an absolute bar. They argue that the possibility of a write-in campaign creates a real possibility for victory, especially for an entrenched incumbent. One may reasonably question the merits of that contention.⁴³ Indeed, we are advised by the state court that

⁴²Justice Dudley noted in his concurrence: "I am reassured by the style of this case, U. S. Term Limits, Inc. That name implies just what this amendment is: A practical limit on the terms of the members of the Congress." 316 Ark., at 276, 872 S. W. 2d, at 364 (opinion concurring in part and dissenting in part).

⁴³The uncontested data submitted to the Arkansas Supreme Court indicate that, in over 1,300 Senate elections since the passage of the Seventeenth Amendment in 1913, only one has been won by a write-in candidate. In over 20,000 House elections since the turn of the century, only five have been won by write-in candidates. App. 201-202. Indeed, it is for this reason that the Arkansas Supreme Court found the possibility of a write-in victory to be a mere "glim-

mer" there is nothing more than a faint glimmer of possibility that the excluded candidate will win.⁴⁴ Our prior cases, too, have suggested that write-in candidates have only a slight chance of victory.⁴⁵ But even if petitioners are correct that incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election. In our view, an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand. To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded. More importantly, allowing States to evade the Qualifications Clauses by "dress[ing] eligibility to stand for Congress in ballot access clothing" trivializes the basic principles of our democracy that underlie those Clauses. Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. "It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Gomillion v. Lightfoot*, 364 U. S. 339, 345 (1960), quoting *Frost & Frost Trucking Co. v. Railroad Comm'n of California*, 271 U. S. 583, 594 (1926).

Petitioners make the related argument that Amendment 73 merely regulates the "Manner" of elections, and that the Amendment is therefore a permissible exercise of state power under Article I, §4, cl. 1 (the Elections Clause) to regulate the "Times, Places and Manner" of elections.⁴⁶ We cannot agree.

A necessary consequence of petitioners' argument is that Congress itself would have the power to "make or

me[r] of opportunity for those disqualified." 316 Ark., at 266, 872 S. W. 2d, at 357; see also *id.*, at 276, 872 S. W. 2d, at 364 (Dudley, J., concurring in part and dissenting in part) ("as a practical matter, the amendment would place term limits on service in the Congress").

⁴⁴Contrary to the dissent, *post*, at 80, we read a majority of the Arkansas Supreme Court as holding that Amendment 73 has the same practical effect as an absolute bar. See 316 Ark., at 266, 872 S. W. 2d, at 357 (plurality opinion) (the "intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service"); *id.*, at 276, 872 S. W. 2d, at 364 (Dudley, J., concurring in part and dissenting in part) ("That name implies just what this amendment is: A practical limit on the terms of the members of the Congress"). However, as we note in the text, *infra*, at 53-54, we do not rely on the State Court's finding on this point. See also *infra*, at 59.

⁴⁵We noted in *Lubin v. Panish*, 415 U. S. 709 (1974), that "[t]he realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot." *Id.* at 719, n. 5; see also *Anderson v. Celebrezze*, 460 U. S. 780, 799, n. 26 (1983) ("We have previously noted that [a write-in] opportunity is not an adequate substitute for having the candidates name appear on the printed ballot"); *United States v. Classic*, 313 U. S. 299, 313 (1941) ("Even if . . . voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law . . . is such as to impose serious restrictions upon the choice of candidates by the voters"); *Burdick v. Takushi*, 504 U. S. —, n. 7 (slip op., at 9, n. 7) (1992) ("If the dissent were correct in suggesting that requiring primary voters to select a specific ballot impermissibly burdened the right to vote, it is clear under our decisions that the availability of a write-in option would not provide an adequate remedy").

⁴⁶Article I, §4, cl. 1 provides:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

alter" a measure such as Amendment 73. Art. I, §4, cl. 1. See *Smiley v. Holm*, 285 U. S. 355, 366-367 (1932) ("[T]he Congress may supplement these state regulations or may substitute its own"). That the Framers would have approved of such a result is unfathomable. As our decision in *Powell* and our discussion above make clear, the Framers were particularly concerned that a grant to Congress of the authority to set its own qualifications would lead inevitably to congressional self-aggrandizement and the upsetting of the delicate constitutional balance. See *supra*, at 9-11, and n. 10, *supra*. Petitioners would have us believe, however, that even as the Framers carefully circumscribed congressional power to set qualifications, they intended to allow Congress to achieve the same result by simply formulating the regulation as a ballot access restriction under the Elections Clause. We refuse to adopt an interpretation of the Elections Clause that would so cavalierly disregard what the Framers intended to be a fundamental constitutional safeguard.

Moreover, petitioners' broad construction of the Elections Clause is fundamentally inconsistent with the Framers' view of that Clause. The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office. During the Convention debates, for example, Madison illustrated the procedural focus of the Elections Clause by noting that it covered "[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district." 2 *Farrand* 240. Similarly, during the ratification debates, proponents of the Constitution noted: "[T]he power over the manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way." 4 *Elliot's Debates* 71 (Steele statement at North Carolina ratifying convention) (emphasis in original).⁴⁷

Hamilton made a similar point in *The Federalist* No. 60, in which he defended the Constitution's grant to Congress of the power to override state regulations. Hamilton expressly distinguished the broad power to set qualifications from the limited authority under the Elections Clause, noting that

"there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *The Federalist* No. 60, at 371 (emphasis in original).

As Hamilton's statement suggests, the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.

⁴⁷ See also "The Republican," *Connecticut Courant* (Hartford, Jan. 7, 1788), 1 *Bailyn* 710, 713 ("The constitution expressly provides that the choice shall be by the people, which cuts off both from the general and state Legislatures the power of so regulating the mode of election, as to deprive the people of a fair choice").

Our cases interpreting state power under the Elections Clause reflect the same understanding. The Elections Clause gives States authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U. S., at 366. However, "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights." *Tashjian v. Republican Party of Connecticut*, 479 U. S. 208, 217 (1986). States are thus entitled to adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U. S. 780, 788, n. 9 (1983). For example, in *Storer v. Brown*, 415 U. S. 724 (1974), the case on which petitioners place principal reliance, we upheld the validity of certain provisions of the California Election Code. In so doing, we emphasized the States' interest in having orderly, fair, and honest elections "rather than chaos." *Id.*, at 730. We also recognized the "States' strong interest in maintaining the integrity of the political process by preventing interparty raiding," *id.*, at 731, and explained that the specific requirements applicable to independents were "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot," *id.*, at 733. In other cases, we have approved the States' interests in avoiding "voter confusion, ballot overcrowding, or the presence of frivolous candidacies," *Munro v. Socialist Workers Party*, 479 U. S. 189, 194-195 (1986), in "seeking to assure that elections are operated equitably and efficiently," *Burdick v. Takushi*, 504 U. S., at __ (slip op. at 5), and in "guard[ing] against irregularity and error in the tabulation of votes," *Roudebush v. Hartke*, 405 U. S. 15, 25 (1972). In short, we have approved of state regulations designed to ensure that elections are "fair and honest and . . . [that] some sort of order, rather than chaos, . . . accompan[ies] the democratic processes." *Burdick v. Takushi*, 504 U. S., at __ (slip op. at 4), quoting *Storer*, 415 U. S., at 730.

The provisions at issue in *Storer* and our other Elections Clause cases were thus constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position. They served the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service in Congress. And they did not involve measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process. Our cases upholding state regulations of election procedures thus provide little support for the contention that a state-imposed ballot access restriction is constitutional when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses.⁴⁸

⁴⁸ Nor does *Clements v. Fashing*, 457 U. S. 957 (1982) support petitioners. In *Clements*, the Court rejected First and Fourteenth Amendment challenges to Texas' so-called "resign-to-run" provision. That provision treated an elected state official's declaration of candidacy for another elected office as an automatic resignation from the office then held. We noted that the regulation was a permissible attempt to regulate state officeholders. See *id.*, at 972 ("Appel-

We do not understand the dissent to contest our primary thesis, namely that if the qualifications for Congress are fixed in the Constitution, then a State-passed measure with the avowed purpose of imposing indirectly such an additional qualification violates the Constitution. The dissent, instead, raises two objections, challenging the assertion that the Arkansas amendment has the likely effect of creating a qualification, *post*, at 79, and suggesting that the true intent of Amendment 73 was not to evade the Qualifications Clause but rather to simply "level the playing field," *post*, at 83. Neither of these objections has merit.

As to the first, it is simply irrelevant to our holding today. As we note above in n. 45, *supra*, our prior cases strongly suggest that write-in candidates will have only a slim chance of success, and the Arkansas plurality agreed. However, we expressly do not rest on this Court's prior observations regarding write-in candidates. Instead, we hold that a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly. Thus, the dissent's discussion of the evidence concerning the possibility that a popular incumbent will win a write-in election is simply beside the point.

As to the second argument, we find wholly unpersuasive the dissent's suggestion that Amendment 73 was designed merely to "level the playing field." As we have noted, *supra*, at 52, it is obvious that the sole purpose of Amendment 73 was to limit the terms of elected officials, both State and federal, and that Amendment 73, therefore, may not stand.

V

The merits of term limits, or "rotation," have been the subject of debate since the formation of our Constitution, when the Framers unanimously rejected a proposal to add such limits to the Constitution. The cogent arguments on both sides of the question that were articulated during the process of ratification largely retain their force today. Over half the States have adopted measures that impose such limits on some offices either directly or indirectly, and the Nation as a whole, notably by constitutional amendment, has imposed a limit on the number of terms that the President may serve.⁴⁹ Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will

lose touch with their constituents. It is not our province to resolve this longstanding debate.

We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process⁵⁰—through the Amendment procedures set forth in Article V. The Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the Nation. That decision reflects the Framers' understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government. In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a "more perfect Union."

The judgment is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring.

I join the opinion of the Court.

The majority and dissenting opinions demonstrate the intricacy of the question whether or not the Qualifications Clauses are exclusive. In my view, however, it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system. The dissent's course of reasoning suggesting otherwise might be construed to disparage the republican character of the National Government, and it seems appropriate to add these few remarks to explain why that course of argumentation runs counter to fundamental principles of federalism.

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it. It must be remembered that the National Government too is republican in essence and in theory. John Jay insisted

lees are elected state officeholders who contest restrictions on partisan political activity") (emphasis deleted); *id.*, at 974, n. 1 (STEVENS, J., concurring in part and concurring in judgment) ("The fact that appellees hold state office is sufficient to justify a restriction on their ability to run for other office that is not imposed on the public generally"). As the Ninth Circuit recognized in upholding a similar resign-to-run statute from Arizona, "[t]he burden on candidacy . . . is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress." *Joyner v. Mofford*, 706 F.2d 1523, 1528 (1983); see also *Signorelli v. Evans*, 637 F.2d 853, 859 (CA2 1980) ("New York's purpose is to regulate the judicial office that [the candidate] holds, not the Congressional office he seeks"). Moreover, as now-Chief Judge Newman observed while upholding similar restrictions imposed by New York, such provisions "plac[e] no obstacle between [a candidate] and the ballot or his nomination or his election. He is free to run and the people are free to choose him." *Id.*, at 858.

⁴⁹See U. S. Const., Amdt. 22 (1951) (limiting Presidents to two 4-year terms).

⁵⁰See, e. g., Amdt. 17 (1913) (direct elections of Senators); Amdt. 19 (1920) (extending suffrage to women); Amdt. 22 (1951) (Presidential term limits); Amdt. 24 (1964) (prohibition against poll taxes); Amdt. 26 (1971) (lowering age of voter eligibility to 18).

on this point early in *The Federalist Papers*, in his comments on the government that preceded the one formed by the Constitution.

"To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection. . . .

"A strong sense of the value and blessings of union induced the people, at a very early period, to institute a federal government to preserve and perpetuate it. They formed it almost as soon as they had a political existence" *The Federalist* No. 2, pp. 38-39 (C. Rossiter ed. 1961) (hereinafter *The Federalist*).

Once the National Government was formed under our Constitution, the same republican principles continued to guide its operation and practice. As James Madison explained, the House of Representatives "derive[s] its powers from the people of America," and "the operation of the government on the people in their individual capacities" makes it "a national government," not merely a federal one. *The Federalist* No. 39, at 244, 245 (emphasis omitted). The Court confirmed this principle in *McCulloch v. Maryland*, 4 Wheat. 316, 404-405 (1819), when it said, "The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." The same theory led us to observe as follows in *Ex parte Yarbrough*, 110 U. S. 651, 666 (1884): "In a republican government, like ours, . . . political power is reposed in representatives of the entire body of the people."

In one sense it is true that "the people of each State retained their separate political identities," *post*, at 5, for the Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union. It does not at all follow from this that the sole political identity of an American is with the State of his or her residence. It denies the dual character of the Federal Government which is its very foundation to assert that the people of the United States do not have a political identity as well, one independent of, though consistent with, their identity as citizens of the State of their residence. Cf. *post*, at 4-6. It must be recognized that "[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country." *Shapiro v. Thompson*, 394 U. S. 618, 630 (1969) (quoting *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J., dissenting); see *Crandall v. Nevada*, 6 Wall. 35, 43 (1868) ("The people of these United States constitute one nation" and "have a government in which all of them are deeply interested").

It might be objected that because the States ratified the Constitution, the people can delegate power only through the States or by acting in their capacities as citizens of particular States. See *post*, at 2-3. But in *McCulloch v. Maryland*, the Court set forth its authoritative rejection of this idea:

"The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument . . . was submitted to the people. . . . It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of break-

ing down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments." 4 Wheat., at 403.

The political identity of the entire people of the Union is reinforced by the proposition, which I take to be beyond dispute, that, though limited as to its objects, the National Government is and must be controlled by the people without collateral interference by the States. *McCulloch* affirmed this proposition as well, when the Court rejected the suggestion that States could interfere with federal powers. "This was not intended by the American people. They did not design to make their government dependent on the States." *Id.*, at 432. The States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere. See *id.*, at 430 (where there is an attempt at "usurpation of a power which the people of a single State cannot give," there can be no question whether the power "has been surrendered" by the people of a single State because "[t]he right never existed"). That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States. See *United States v. Lopez*, 514 U. S. ___ (1995).

Of course, because the Framers recognized that state power and identity were essential parts of the federal balance, see *The Federalist* No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution uses state boundaries to fix the size of congressional delegations, U. S. Const., Art. I, §2, cl. 3, ensures that each State shall have at least one representative, *ibid.*, grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, §4, cl. 1, requires that when the President is elected by the House of Representatives, the delegations from each State have one vote, Art. II, §1, cl. 3, and Amdt. 12, and allows States to appoint electors for the President, Art. II, §1, cl. 2. Nothing in the Constitution or *The Federalist Papers*, however, supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives. Indeed, even though the Constitution uses the qualifications for voters of the most numerous branch of the States' own legislatures to set the qualifications of federal electors, Art. I, §2, cl. 1, when these electors vote, we have recognized that they act in a federal capacity and exercise a federal right. Addressing this principle in *Ex parte Yarbrough* the Court stated as follows: "[T]he right to vote for a member of Congress" is an "office . . . created by that Constitution, and by that alone. . . . It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State." 110 U. S., at 663-664. We made the same point in *United States v. Classic*, 313 U. S. 299, 315 (1941), when we said, "[T]he right of qualified voters within a state to cast their ballots and have them counted at

Congressional elections . . . is a right secured by the Constitution" and "is secured against the action of individuals as well as of states."

The federal character of congressional elections flows from the political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself. Even before the passage of the Fourteenth Amendment, the latter proposition was given expression in *Crandall v. Nevada* where the Court recognized the right of the Federal Government to call "any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices," and further recognized that "this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered." 6 Wall., at 43. And without reference to the Privileges and Immunities Clause, the rights of national citizenship were upheld again in *United States v. Cruikshank*, 92 U. S. 542, 552 (1876), where the Court said, "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." Cf. *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 513 (1939) (opinion of Roberts, J., joined by Black, J., and joined in relevant part by Hughes, C. J.) ("Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom").

In the *Slaughter-House Cases*, 16 Wall. 36, 78-80 (1873), the Court was careful to hold that federal citizenship in and of itself suffices for the assertion of rights under the Constitution, rights that stem from sources other than the States. Though the *Slaughter-House Cases* interpreted the Privileges and Immunities Clause of the Fourteenth Amendment, its view of the origins of federal citizenship was not confined to that source. Referring to these rights of national dimension and origin the Court observed: "But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, at 79. Later cases only reinforced the idea that there are such incidents of national citizenship. See *Ex parte Yarbrough*, *supra*; *Terral v. Burke Constr. Co.*, 257 U. S. 529 (1922); *United States v. Classic*, *supra*; *United States v. Guest*, 383 U. S. 745 (1966); *Shapiro v. Thompson*, 394 U. S. 618 (1969). Federal privileges and immunities may seem limited in their formulation by comparison with the expansive definition given to the privileges and immunities attributed to state citizenship, see *Slaughter-House Cases*, *supra*, at 78; *Hague*, *supra*, at 520 (opinion of Stone, J.), but that federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute.

Not the least of the incongruities in the position advanced by Arkansas is the proposition, necessary to its

case, that it can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised it. If the majority of the voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future. Quite apart from any First Amendment concerns, see *Williams v. Rhodes*, 393 U. S. 23, 30 (1968); *Anderson v. Celebrezze*, 460 U. S. 780, 786-788 (1983), neither the law nor federal theory allows a State to burden the exercise of federal rights in this manner. See *Terral v. Burke Constr. Co.*, *supra*, at 532; *Shapiro v. Thompson*, *supra*, at 629-631. Indeed, as one of the "right[s] of the citizen[s] of this great country, protected by implied guarantees of its Constitution," the Court identified the right "to come to the seat of government . . . to share its offices, to engage in administering its functions." *Slaughter-House Cases*, *supra*, at 79 (quoting *Crandall v. Nevada*, 6 Wall., at 44). This observation serves to illustrate the extent of the State's attempted interference with the federal right to vote (and the derivative right to serve if elected by majority vote) in a congressional election, rights that do not derive from the state power in the first instance but that belong to the voter in his or her capacity as a citizen of the United States.

It is maintained by our dissenting colleagues that the State of Arkansas seeks nothing more than to grant its people surer control over the National Government, a control, it is said, that will be enhanced by the law at issue here. The arguments for term limitations (or ballot restrictions having the same effect) are not lacking in force; but the issue, as all of us must acknowledge, is not the efficacy of those measures but whether they have a legitimate source, given their origin in the enactments of a single State. There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere. Because the Arkansas enactment intrudes upon this federal domain, it exceeds the boundaries of the Constitution.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

It is ironic that the Court bases today's decision on the right of the people to "choose whom they please to govern them." See *ante*, at 2, 13, 14, 15, 41. Under our Constitution, there is only one State whose people have the right to "choose whom they please" to represent Arkansas in Congress. The Court holds, however, that neither the elected legislature of that State nor the people themselves (acting by ballot initiative) may prescribe any qualifications for those representatives. The majority therefore defends the right of the people of Arkansas to "choose whom they please to govern them" by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State.

I dissent. Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.

I

Because the majority fundamentally misunderstands the notion of "reserved" powers, I start with some first principles. Contrary to the majority's suggestion, the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress, or to authorize their elected state legislators to do so.

A

Our system of government rests on one overriding principle: all power stems from the consent of the people. To phrase the principle in this way, however, is to be imprecise about something important to the notion of "reserved" powers. The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.

The ratification procedure erected by Article VII makes this point clear. The Constitution took effect once it had been ratified by the people gathered in convention in nine different States. But the Constitution went into effect only "between the States so ratifying the same," Art. VII; it did not bind the people of North Carolina until they had accepted it. In Madison's words, the popular consent upon which the Constitution's authority rests was "given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." The Federalist No. 39, p. 243 (C. Rossiter ed. 1961) (hereinafter *The Federalist*). Accord, 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 94 (J. Elliot 2d ed. 1876) (hereinafter *Elliot*) (remarks of James Madison at the Virginia convention).¹

When they adopted the Federal Constitution, of course, the people of each State surrendered some of their authority to the United States (and hence to entities accountable to the people of other States as well as to themselves). They affirmatively deprived their States of certain powers, see, e.g., Art. I, §10, and they affirmatively conferred certain powers upon the Federal Government, see, e.g., Art. I, §8. Because the people of the several States are the only true source of power, however, the Federal Government enjoys no authority beyond what the Constitution confers: the Federal Government's powers are limited and enumerated. In the words of Justice Black, "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source." *Reid v. Covert*, 354 U. S. 1, 5-6 (1957) (plurality opinion) (footnote omitted).

¹The ringing initial words of the Constitution—"We the People of the United States"—convey something of the same idea. (In the Constitution, after all, "the United States" is consistently a plural noun. See Art. I, §9, cl. 8; Art. II, §1, cl. 7; Art. III, §2, cl. 1; Art. III, §3, cl. 1.) The Preamble that the Philadelphia Convention approved before sending the Constitution to the Committee of Style is even clearer. It began: "We the people of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia . . ." 2 Records of the Federal Convention of 1787, p. 565 (M. Farrand ed. 1911) (hereinafter *Farrand*). Scholars have suggested that the Committee of Style adopted the current language because it was not clear that all the States would actually ratify the Constitution. M. Farrand, *The Framing of the Constitution of the United States 190-191* (1913). In this instance, at least, I agree with the majority that the Committee's edits did not work a substantive change in the Constitution. Cf. *ante*, at 12, n. 8.

In each State, the remainder of the people's powers—"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States." Amdt. 10—are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government. As far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them. The Federal Government and the States thus face different default rules: where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.

These basic principles are enshrined in the Tenth Amendment, which declares that all powers neither delegated to the Federal Government nor prohibited to the States "are reserved to the States respectively, or to the people." With this careful last phrase, the Amendment avoids taking any position on the division of power between the state governments and the people of the States: it is up to the people of each State to determine which "reserved" powers their state government may exercise. But the Amendment does make clear that powers reside at the state level except where the Constitution removes them from that level. All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.

To be sure, when the Tenth Amendment uses the phrase "the people," it does not specify whether it is referring to the people of each State or the people of the Nation as a whole. But the latter interpretation would make the Amendment pointless: there would have been no reason to provide that where the Constitution is silent about whether a particular power resides at the state level, it might or might not do so. In addition, it would make no sense to speak of powers as being reserved to the undifferentiated people of the Nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation. Thus, the amendment provision of Article V calls for amendments to be ratified not by a convention of the national people, but by conventions of the people in each State or by the state legislatures elected by those people. Likewise, the Constitution calls for Members of Congress to be chosen State by State, rather than in nationwide elections. Even the selection of the President—surely the most national of national figures—is accomplished by an electoral college made up of delegates chosen by the various States, and candidates can lose a Presidential election despite winning a majority of the votes cast in the Nation as a whole. See also Art. II, §1, cl. 3 (providing that when no candidate secures a majority of electoral votes, the election of the President is thrown into the House of Representatives, where "the Votes shall be taken by States, the Representatives from each State having one Vote"); Amdt. 12 (same).

In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them. The people of each State

obviously did trust their fate to the people of the several States when they consented to the Constitution; not only did they empower the governmental institutions of the United States, but they also agreed to be bound by constitutional amendments that they themselves refused to ratify. See Art. V (providing that proposed amendments shall take effect upon ratification by three-quarters of the States). At the same time, however, the people of each State retained their separate political identities. As Chief Justice Marshall put it, "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass." *McCulloch v. Maryland*, 4 Wheat. 316, 403 (1819).²

Any ambiguity in the Tenth Amendment's use of the phrase "the people" is cleared up by the body of the Constitution itself. Article I begins by providing that the Congress of the United States enjoys "[a]ll legislative Powers herein granted," §1, and goes on to give a careful enumeration of Congress' powers, §8. It then concludes by enumerating certain powers that are prohibited to the States. The import of this structure is the same as the import of the Tenth Amendment: if we are to invalidate Arkansas' Amendment 73, we must point to something in the Federal Constitution that deprives the people of Arkansas of the power to enact such measures.

B

The majority disagrees that it bears this burden. But its arguments are unpersuasive.

1

The majority begins by announcing an enormous and untenable limitation on the principle expressed by the Tenth Amendment. According to the majority, the States possess only those powers that the Constitution affirmatively grants to them or that they enjoyed before the Constitution was adopted; the Tenth Amendment "could only 'reserve' that which existed before." *Ante*, at 22. From the fact that the States had not previously enjoyed any powers over the particular institutions of the Federal Government established by the Constitution,³ the majority derives a rule precisely opposite to

the one that the Amendment actually prescribes: "[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them." *Ibid.* (quoting 1 J. Story, *Commentaries on the Constitution of the United States* §627 (3d ed. 1858)).

The majority's essential logic is that the state governments could not "reserve" any powers that they did not control at the time the Constitution was drafted. But it was not the state governments that were doing the reserving. The Constitution derives its authority instead from the consent of the people of the States. Given the fundamental principle that all governmental powers stem from the people of the States, it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled.

The Tenth Amendment's use of the word "reserved" does not help the majority's position. If someone says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the people who control the facility have designated that group as the entity with authority to use it. The Tenth Amendment is similar: the people of the States, from whom all governmental powers stem, have specified that all powers not prohibited to the States by the Federal Constitution are reserved "to the States respectively, or to the people."

The majority is therefore quite wrong to conclude that the people of the States cannot authorize their state governments to exercise any powers that were unknown to the States when the Federal Constitution was drafted. Indeed, the majority's position frustrates the apparent purpose of the Amendment's final phrase. The Amendment does not pre-empt any limitations on state power found in the state constitutions, as it might have done if it simply had said that the powers not delegated to the Federal Government are reserved to the States. But the Amendment also does not prevent the people of the States from amending their state constitutions to remove limitations that were in effect when the Federal Constitution and the Bill of Rights were ratified.

In an effort to defend its position, the majority points to language in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549 (1985), which it takes to indicate that the Tenth Amendment covers only "the original powers of [state] sovereignty." *Ante*, at 22. But *Garcia* dealt with an entirely different issue: the extent to which principles of state sovereignty implicit in our federal system curtail Congress' authority to exercise its enumerated powers. When we are asked to decide whether a congressional statute that appears to have been authorized by Article I is nonetheless unconstitutional because it invades a protected sphere of state sovereignty, it may well be appropriate for us to inquire into what we have called the "traditional aspects of state sovereignty." See *National League of Cities v. Usery*,

²The concurring opinion appears to draw precisely the opposite conclusion from the passage in *McCulloch* that contains this sentence. See *ante*, at 3-4. But while the concurring opinion seizes on Marshall's references to "the people," Marshall was merely using that phrase in contradistinction to "the State governments." Counsel for Maryland had noted that "the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective States. To suppose that the mere proposition of this fundamental law threw the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish." *McCulloch*, 4 Wheat., at 363 (argument of counsel). Marshall's opinion accepted this premise, even borrowing some of counsel's language. See *id.*, at 403. What Marshall rejected was counsel's conclusion that the Constitution therefore was merely "a compact between the States." See *id.*, at 363 (argument of counsel). As Marshall explained, the acts of "the people themselves" in the various ratifying conventions should not be confused with "the measures of the State governments." *Id.*, at 403; see also *id.*, at 404 (noting that no state government could control whether the people of that State decided to adopt the Constitution).

³At the time of the Framing, of course, a Federal Congress had been operating under the Articles of Confederation for some 10 years. The States unquestionably had enjoyed the power to establish qualifications for their delegates to this body, above and beyond

the qualifications created by the Articles themselves. See Brief for Respondents Bobbie E. Hill et al. 39, n. 79 (conceding this point); see also, e.g., Md. Const. of 1776, Art. XXVII (prescribing such qualifications), in 3 Federal and State Constitutions 1695-1696 (F. Thorpe ed. 1909) (hereinafter Thorpe); N. H. Const. of 1784, Pt. II (same), in 4 Thorpe 2467. It is surprising, then, that the concurring opinion seeks to buttress the majority's case by stressing the continuing applicability of "the same republican principles" that had prevailed under the Articles. See *ante*, at 2.

426 U. S. 833, 841, 849 (1976); see also *New York v. United States*, 505 U. S. ___, ___ (1992) (slip op., at 8-9). The question raised by the present case, however, is not whether any principle of state sovereignty implicit in the Tenth Amendment bars congressional action that Article I appears to authorize, but rather whether Article I bars state action that it does not appear to forbid. The principle necessary to answer this question is express on the Tenth Amendment's face: unless the Federal Constitution affirmatively prohibits an action by the States or the people, it raises no bar to such action.

The majority also seeks support for its view of the Tenth Amendment in *McCulloch v. Maryland*, 4 Wheat. 316 (1819). See *ante*, at 22-23. But this effort is misplaced. *McCulloch* did make clear that a power need not be "expressly" delegated to the United States or prohibited to the States in order to fall outside the Tenth Amendment's reservation; delegations and prohibitions can also arise by necessary implication.⁴ True to the text of the Tenth Amendment, however, *McCulloch* indicated that all powers as to which the Constitution does not speak (whether expressly or by necessary implication) are "reserved" to the state level. Thus, in its only discussion of the Tenth Amendment, *McCulloch* observed that the Amendment "leav[es] the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole [Constitution]." *Id.*, at 406. *McCulloch* did not qualify this observation by indicating that the question also turned on whether the States had enjoyed the power before the framing. To the contrary, *McCulloch* seemed to assume that the people had "conferred on the general government the power contained in the constitution, and on the States the whole residuum of power." *Id.*, at 410.

The structure of *McCulloch*'s analysis also refutes the majority's position. The question before the Court was whether the State of Maryland could tax the Bank of the United States, which Congress had created in an effort to accomplish objects entrusted to it by the Constitution. Chief Justice Marshall's opinion began by upholding the federal statute incorporating the Bank. *Id.*, at 400-425. It then held that the Constitution affirmatively prohibited Maryland's tax on the Bank created by this statute. *Id.*, at 425-437. The Court relied principally on concepts that it deemed inherent in the Supremacy Clause of Article VI, which declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land" In the Court's view, when a power has been "delegated to the United States by the Constitution," Amdt. 10, the Supremacy Clause forbids a State to "retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry [that power] into execution." *McCulloch*, 4 Wheat., at 436. Thus, the Court concluded that the very nature of state taxation on the Bank's operations was "incompatible with, and repugnant to," the federal statute creating the Bank. See *id.*, at 425.

For the past 175 years, *McCulloch* has been understood to rest on the proposition that the Constitution

affirmatively barred Maryland from imposing its tax on the Bank's operations. See, e.g., *Osborn v. Bank of United States*, 9 Wheat. 738, 859-868 (1824) (reaffirming *McCulloch*'s conclusion that by operation of the Supremacy Clause, the federal statute incorporating the Bank impliedly pre-empted state laws attempting to tax the Bank's operations); *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981) (citing *McCulloch* for the proposition that the Supremacy Clause deprives the States of the power to pass laws that conflict with federal statutes); see also *North Dakota v. United States*, 495 U. S. 423, 434 (1990) (plurality opinion) (citing *McCulloch* for the proposition that state laws may violate the Supremacy Clause when they "regulate the Government directly or discriminate against it").⁵ For the majority, however, *McCulloch* apparently turned on the fact that before the Constitution was adopted, the States had possessed no power to tax the instrumentalities of the governmental institutions that the Constitution created. This understanding of *McCulloch* makes most of Chief Justice Marshall's opinion irrelevant; according to the majority, there was no need to inquire into whether federal law deprived Maryland of the power in question, because the power could not fall into the category of "reserved" powers anyway.⁶

Despite the majority's citation of *Garcia* and *McCulloch*, the only true support for its view of the Tenth Amendment comes from Joseph Story's 1833

⁵Though cited by the majority, see *ante*, at 22, *Crandall v. Nevada*, 6 Wall. 35 (1868), did not deviate from this accepted view of *McCulloch*. See *Crandall*, *supra*, at 48 (observing that *McCulloch* and a number of other cases "distinctly placed the invalidity of the State taxes on the ground that they interfered with an authority of the Federal government").

⁶To support its decision to attribute such surplusage to *McCulloch*, the majority quotes Marshall's observation that his opinion "does not deprive the States of any resources which they originally possessed," because the power to tax federal instrumentalities was not encompassed by the States' "original right to tax." *Ante*, at 22-23 (quoting *McCulloch*, 4 Wheat., at 436, 430). In part, Marshall was simply refuting counsel's argument that it would constitute an "overwhelming invasion of State sovereignty" for Congress to establish a bank that operated within a State but that nonetheless was exempt from state taxes. See 4 Wheat., at 337-339 (argument of counsel) (stressing that "the right to raise revenue" is "the highest attribute of sovereignty" and indeed amounts to "the right to exist"). While Marshall acknowledged that "this original right of taxation" was an "essential" attribute of state sovereignty that Congress could not constitutionally control or invade, he focused more precisely than counsel on "the nature and extent of this original right," *id.*, at 428, and concluded that it did not include the right "to tax the means employed by the government of the Union, for the execution of its powers." *Id.*, at 430. In this respect, then, the Court was referring to the States' "original" powers in much the same context as *Garcia*: the Court was examining whether Congress' exercise of the "privilege of exempting its own measures from State taxation," *McCulloch*, *supra*, at 434, had invaded a protected sphere of state sovereignty.

Marshall did go on to argue that the power to tax the operations of the Bank of the United States simply was not susceptible to control by the people of a single State. See 4 Wheat., at 430. But that theory is perfectly consistent with my position. Marshall reasoned that the people of a single State may not tax the instrumentalities employed by the people of all the States through the National Government, because such taxation would effectively subject the people of the several States to the taxing power of a single State. See *id.*, at 428. This sort of argument proves that the people of a single State may not prescribe qualifications for the President of the United States; the selection of the President, like the operation of the Bank of the United States, is not up to the people of any single State. See *infra*, at 18. It does not follow, however, that the people of a single State may not prescribe qualifications for their own representatives in Congress.

⁴Despite the majority's odd suggestion to the contrary, see *ante*, at 16, n. 12, I fully agree with this sensible position. See *supra*, at 4.

treatise on constitutional law. See 2 J. Story, Commentaries on the Constitution of the United States §§623-628. Justice Story was a brilliant and accomplished man, and one cannot casually dismiss his views. On the other hand, he was not a member of the Founding generation, and his Commentaries on the Constitution were written a half century after the framing. Rather than representing the original understanding of the Constitution, they represent only his own understanding. In a range of cases concerning the federal/state relation, moreover, this Court has deemed positions taken in Story's commentaries to be more nationalist than the Constitution warrants. Compare, e.g., *id.*, §§1063-1069 (arguing that the Commerce Clause deprives the States of the power to regulate any commerce within Congress' reach) with *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Society for Relief of Distressed Pilots*, 12 How. 299 (1852) (holding that Congress' Commerce Clause powers are not exclusive). See also 1 Life and Letters of Joseph Story 296 (W. Story ed. 1851) (extract of manuscript written by Story) ("I hold it to be a maxim, which should never be lost sight of by a great statesman, that the Government of the United States is intrinsically too weak, and the powers of the State Governments too strong"). In this case too, Story's position that the only powers reserved to the States are those that the States enjoyed before the framing conflicts with both the plain language of the Tenth Amendment and the underlying theory of the Constitution.

2

The majority also sketches out what may be an alternative (and narrower) argument. Again citing Story, the majority suggests that it would be inconsistent with the notion of "national sovereignty" for the States or the people of the States to have any reserved powers over the selection of Members of Congress. See *ante*, at 23-24, 26. The majority apparently reaches this conclusion in two steps. First, it asserts that because Congress as a whole is an institution of the National Government, the individual Members of Congress "owe primary allegiance not to the people of a State, but to the people of the Nation." See *ante*, at 23-24. Second, it concludes that because each Member of Congress has a nationwide constituency once he takes office, it would be inconsistent with the Framers' scheme to let a single State prescribe qualifications for him. See *ante*, at 24, 61.

Political scientists can debate about who commands the "primary allegiance" of Members of Congress once they reach Washington. From the framing to the present, however, the selection of the Representatives and Senators from each State has been left entirely to the people of that State or to their state legislature. See Art. I, §2, cl. 1 (providing that members of the House of Representatives are chosen "by the People of the several States"); Art. I, §3, cl. 1 (originally providing that the Senators from each State are "chosen by the Legislature thereof"); Amdt. 17 (amending §3 to provide that the Senators from each State are "elected by the people thereof"). The very name "congress" suggests a coming together of representatives from distinct entities.⁷ In keeping with the complexity of our federal

system, once the representatives chosen by the people of each State assemble in Congress, they form a national body and are beyond the control of the individual States until the next election. But the selection of representatives in Congress is indisputably an act of the people of each State, not some abstract people of the Nation as a whole.

The concurring opinion suggests that this cannot be so, because it is the Federal Constitution that guarantees the right of the people of each State (so long as they are qualified electors under state law) to take part in choosing the Members of Congress from that State: See *ante*, at 5-6. But the presence of a federally guaranteed right hardly means that the selection of those representatives constitutes "the exercise of federal authority." See *ante*, at 4. When the people of Georgia pick their representatives in Congress, they are acting as the people of Georgia, not as the corporate agents for the undifferentiated people of the Nation as a whole. See *In re Green*, 134 U. S. 377, 379 (1890) ("Although [Presidential] electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress"). The concurring opinion protests that the exercise of "reserved" powers in the area of congressional elections would constitute "state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." See *ante*, at 5. But when one strips away its abstractions, the concurring opinion is simply saying that the people of Arkansas cannot be permitted to inject themselves into the process by which they themselves select Arkansas' representatives in Congress.

The concurring opinion attempts to defend this surprising proposition by pointing out that Americans are "citizens of the United States" as well as "of the State wherein they reside," Amdt. XIV, §1, and that national citizenship (particularly after the ratification of the Fourteenth Amendment) "has privileges and immunities protected from state abridgement by the force of the Constitution itself," *ante*, at 6. These facts are indeed "beyond dispute," *ante*, at 7, but they do not contradict anything that I have said. Although the United States obviously is a Nation, and although it obviously has citizens, the Constitution does not call for Members of Congress to be elected by the undifferentiated national citizenry; indeed, it does not recognize any mechanism at all (such as a national referendum) for action by the undifferentiated people of the Nation as a whole. See *supra*, at 5. Even at the level of national politics, then, there always remains a meaningful distinction between someone who is a citizen of the United States and of Georgia and someone who is a citizen of the United States and of Massachusetts. The Georgia citizen who is unaware of this distinction will have it pointed out to him as soon as he tries to vote in a Massachusetts congressional election.

In short, while the majority is correct that the Framers expected the selection process to create a

⁷See 1 S. Johnson, A Dictionary of the English Language 393 (4th ed. 1773) (defining "congress" as "[a]n appointed meeting for settlement of affairs between different nations: as, the congress of Cam-

bray"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("an appointed meeting for settlement of affairs between different nations; the assembly which governs the United States of America").

"direct link" between members of the House of Representatives and the people, *ante*, at 23, the link was between the Representatives from each State and the people of that State; the people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress. This arrangement must baffle the majority,⁸ whose understanding of Congress would surely fit more comfortably within a system of nationwide elections. But the fact remains that when it comes to the selection of Members of Congress, the people of each State have retained their independent political identity. As a result, there is absolutely nothing strange about the notion that the people of the States or their state legislatures possess "reserved" powers in this area.

The majority seeks support from the Constitution's specification that Members of Congress "shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." Art. I, §6, cl. 1; see *ante*, at 24-25. But the fact that Members of Congress draw a federal salary once they have assembled hardly means that the people of the States lack reserved powers over the selection of their representatives. Indeed, the historical evidence about the compensation provision suggests that the States' reserved powers may even extend beyond the selection stage. The majority itself indicates that if the Constitution had made no provision for congressional compensation, this topic would have been "left to state legislatures." *Ante*, at 30; accord, 1 Farrand 215-216 (remarks of James Madison and George Mason); *id.*, at 219, n. *. Likewise, Madison specifically indicated that even with the compensation provision in place, the individual States still enjoyed the reserved power to supplement the federal salary. 3 *id.*, at 315 (remarks at the Virginia ratifying convention).

As for the fact that a State has no reserved power to establish qualifications for the office of President, see *ante*, at 24, it surely need not follow that a State has no reserved power to establish qualifications for the Members of Congress who represent the people of that State. Because powers are reserved to the States "respectively," it is clear that no State may legislate for another State: even though the Arkansas legislature enjoys the reserved power to pass a minimum-wage law for Arkansas, it has no power to pass a minimum-wage law for Vermont. For the same reason, Arkansas may not decree that only Arkansas citizens are eligible to be President of the United States; the selection of the President is not up to Arkansas alone, and Arkansas can no more prescribe the qualifications for that office than it can set the qualifications for Members of Congress from Florida. But none of this suggests that Arkansas cannot set qualifications for Members of Congress from Arkansas.

In fact, the Constitution's treatment of Presidential elections actively contradicts the majority's position.

⁸The majority even suggests that congressional elections do not really work in this way, because each House of Congress has the power to judge its Members' qualifications. See *ante*, at 24 (citing Art. I, §5, cl. 1). But the power to act as "Judge" under Art. I, §5, is merely the power to apply pre-existing qualifications to which the people of each State have consented. See *Powell v. McCormack*, 395 U. S. 486 (1969). Whether or not §5 directs each House to judge state-law disqualifications as well as those contained in the Constitution, see *infra*, at 51-52, it is clear that neither House may exclude a representative from Massachusetts for failure to meet a qualification that the people of Massachusetts have not accepted.

While the individual States have no "reserved" power to set qualifications for the office of President, we have long understood that they do have the power (as far as the Federal Constitution is concerned) to set qualifications for their Presidential electors—the delegates that each State selects to represent it in the electoral college that actually chooses the Nation's chief executive. Even respondents do not dispute that the States may establish qualifications for their delegates to the electoral college, as long as those qualifications pass muster under other constitutional provisions (primarily the First and Fourteenth Amendments). See *Williams v. Rhodes*, 393 U. S. 23, 29 (1968); *McPherson v. Blacker*, 146 U. S. 1, 27-36 (1892). As the majority cannot argue that the Constitution affirmatively grants this power,⁹ the power must be one that is "reserved" to the States. It necessarily follows that the majority's understanding of the Tenth Amendment is incorrect, for the position of Presidential elector surely "spring[s] out of the existence of the national government." See *ante*, at 22.

3

In a final effort to deny that the people of the States enjoy "reserved" powers over the selection of their representatives in Congress, the majority suggests that the Constitution expressly delegates to the States certain powers over congressional elections. See *ante*, at 25-26. Such delegations of power, the majority argues, would be superfluous if the people of the States enjoyed reserved powers in this area.

Only one constitutional provision—the Times, Places and Manner Clause of Article I, §4—even arguably supports the majority's suggestion. It reads:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

Contrary to the majority's assumption, however, this Clause does not delegate any authority to the States. Instead, it simply imposes a duty upon them. The majority gets it exactly right: by specifying that the state legislatures "shall" prescribe the details necessary to hold congressional elections, the Clause "expressly requires action by the States." See *ante*, at 25. This command meshes with one of the principal purposes of Congress' "make or alter" power: to ensure that the States hold congressional elections in the first place, so that Congress continues to exist. As one reporter summarized a speech made by John Jay at the New York ratifying convention:

"[E]very government was imperfect, unless it had a power of preserving itself. Suppose that, by design or accident, the states should neglect to appoint representatives; certainly there should be some constitutional remedy for this evil. The obvious meaning of the paragraph was, that, if this neglect

⁹The only provision that might conceivably do so is Article II, §1, which recognizes the authority of state legislatures to specify the "Manner" in which a State appoints its presidential electors. But if a qualifications law is a "Manner" regulation for purposes of this Clause, then it is also a "Manner" regulation for purposes of Article I, §4—which would mean that the Constitution specifically recognizes the power of both the States and the Congress to set qualifications for Senators and Representatives.

should take place. Congress should have power, by law, to support the government, and prevent the dissolution of the Union. [Jay] believed this was the design of the federal Convention." 2 Elliot 326 (emphasis in original).¹⁰

Constitutional provisions that impose affirmative duties on the States are hardly inconsistent with the notion of reserved powers.

Of course, the second part of the Times, Places and Manner Clause does grant a power rather than impose a duty. As its contrasting uses of the words "shall" and "may" confirm, however, the Clause grants power exclusively to Congress, not to the States. If the Clause did not exist at all, the States would still be able to prescribe the times, places, and manner of holding congressional elections; the deletion of the provision would simply deprive Congress of the power to override these state regulations.

The majority also mentions Article II, §1, cl. 2: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress" But this Clause has nothing to do with congressional elections, and in any event it too imposes an affirmative obligation on the States. In fact, some such bare-bones provision was essential in order to coordinate the creation of the electoral college. As mentioned above, moreover, it is uncontested that the States enjoy the reserved power to specify qualifications for the Presidential electors who are chosen pursuant to this Clause. See *supra*, at 18-19.

Respondent Thornton seeks to buttress the majority's position with Article I, §2, cl. 1, which provides:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

According to respondent Thornton, this provision "grants States authority to prescribe the qualifications of [voters] in congressional elections. Brief for Respondent Congressman Ray Thornton 4. If anything, however, the Clause *limits* the power that the States would otherwise enjoy. Though it does leave States with the ability to control who may vote in congressional elections, it has the effect of restricting their authority to establish

special requirements that do not apply in elections for the state legislature.

Our case law interpreting the Clause affirmatively supports the view that the States enjoy reserved powers over congressional elections. We have treated the Clause as a one-way ratchet: while the requirements for voting in congressional elections cannot be more onerous than the requirements for voting in elections for the most numerous branch of the statute legislature, they can be less so. See *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 225-229 (1986). If this interpretation of the Clause is correct, it means that even with the Clause in place, States still have partial freedom to set special voting requirements for congressional elections. As this power is not granted in Article I, it must be among the "reserved" powers.

II

I take it to be established, then, that the people of Arkansas do enjoy "reserved" powers over the selection of their representatives in Congress. Purporting to exercise those reserved powers, they have agreed among themselves that the candidates covered by §3 of Amendment 73—those whom they have already elected to three or more terms in the House of Representatives or to two or more terms in the Senate—should not be eligible to appear on the ballot for reelection, but should nonetheless be returned to Congress if enough voters are sufficiently enthusiastic about their candidacy to write in their names. Whatever one might think of the wisdom of this arrangement, we may not override the decision of the people of Arkansas unless something in the Federal Constitution deprives them of the power to enact such measures.

The majority settles on "the Qualifications Clauses" as the constitutional provisions that Amendment 73 violates. See *ante*, at 26. Because I do not read those provisions to impose any unstated prohibitions on the States, it is unnecessary for me to decide whether the majority is correct to identify Arkansas' ballot-access restriction with laws fixing true term limits or otherwise prescribing "qualifications" for congressional office. As I discuss in Part A below, the Qualifications Clauses are merely straightforward recitations of the minimum eligibility requirements that the Framers thought it essential for every Member of Congress to meet. They restrict state power only in that they prevent the States from abolishing all eligibility requirements for membership in Congress.

Because the text of the Qualifications Clauses does not support its position, the majority turns instead to its vision of the democratic principles that animated the Framers. But the majority's analysis goes to a question that is not before us: whether Congress has the power to prescribe qualifications for its own members. As I discuss in Part B, the democratic principles that contributed to the Framers' decision to withhold this power from Congress do not prove that the Framers also deprived the people of the States of their reserved authority to set eligibility requirements for their own representatives.

In Part C, I review the majority's more specific historical evidence. To the extent that they bear on this case, the records of the Philadelphia Convention affirmatively support my unwillingness to find hidden meaning in the Qualifications Clauses, while the surviving records from the ratification debates help neither side. As for the postratification period, five States supplemented the

¹⁰ Accord, e.g., 2 Elliot 24 (remarks of Caleb Strong at the Massachusetts ratifying convention) ("[I]f the legislature of a state should refuse to make such regulations, the consequence will be, that the representatives will not be chosen, and the general government will be dissolved. In such case, can gentlemen say that a power to remedy the evil is not necessary to be lodged somewhere? And where can it be lodged but in Congress?"); 2 Documentary History of the Ratification of the Constitution 400 (M. Jensen ed. 1976) (notes of Anthony Wayne at the Pennsylvania ratifying convention) ("4th section occasioned by an eventual invasion, insurrection, etc."); The Federalist No. 59, at 363 (Hamilton) (observing that if not subject to any checks, the States "could at any moment annihilate [the Federal Government] by neglecting to provide for the choice of persons to administer its affairs").

These statements about the Clause's purposes also help refute the majority's claim that it was bizarre for the Framers to leave the States relatively free to enact qualifications for congressional office while simultaneously giving Congress "make or alter" power over the States' time, place, and manner regulations. See *infra*, at 52-53.

constitutional disqualifications in their very first election laws. The historical evidence thus refutes any notion that the Qualifications Clauses were generally understood to be exclusive. Yet the majority must establish just such an understanding in order to justify its position that the Clauses impose unstated prohibitions on the States and the people. In my view, the historical evidence is simply inadequate to warrant the majority's conclusion that the Qualifications Clauses mean anything more than what they say.

A

The provisions that are generally known as the Qualifications Clauses read as follows:

"No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Art. I, §2, cl. 2.

"No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." Art. I, §3, cl. 3.

Later in Article I, the "Ineligibility Clause" imposes another nationwide disqualification from congressional office: "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." §6, cl. 2.

The majority is quite correct that the "negative phrasing" of these Clauses has little relevance. See *ante*, at 11-12, n. 8. The Qualifications Clauses would mean the same thing had they been enacted in the form that the Philadelphia Convention referred them to the Committee of Style:

"Every Member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen of the United States for at least seven years before his election; and shall be, at the time of his election, an inhabitant of the State in which he shall be chosen." 2 Farrand 365.

See also *id.*, at 567 (same phrasing for Senate Qualifications Clause). But these different formulations—whether negative or affirmative—merely establish *minimum* qualifications. They are quite different from an *exclusive* formulation, such as the following:

"Every Person who shall have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall, when elected, be an Inhabitant of that State in which he shall be chosen, shall be eligible to be a Representative."

At least on their face, then; the Qualifications Clauses do nothing to prohibit the people of a State from establishing additional eligibility requirements for their own representatives.

Joseph Story thought that such a prohibition was nonetheless implicit in the constitutional list of qualifications, because "[f]rom the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." 2 Commentaries on the Constitution of the United States §624 (1833); see also *ante*, at 12, n. 9. This argument rests on the maxim *expressio unius est exclusio alterius*. When the Framers decided which qualifications to include in the

Constitution, they also decided not to include any other qualifications in the Constitution. In Story's view, it would conflict with this latter decision for the people of the individual States to decide, as a matter of state law, that they would like their own representatives in Congress to meet additional eligibility requirements.

To spell out the logic underlying this argument is to expose its weakness. Even if one were willing to ignore the distinction between requirements enshrined in the Constitution and other requirements that the Framers were content to leave within the reach of ordinary law, Story's application of the *expressio unius* maxim takes no account of federalism. At most, the specification of certain nationwide disqualifications in the Constitution implies the negation of other *nationwide* disqualifications; it does not imply that individual States or their people are barred from adopting their own disqualifications on a state-by-state basis. Thus, the one delegate to the Philadelphia Convention who voiced anything approaching Story's argument said only that a recital of qualifications in the Constitution would imply that Congress lacked any qualification-setting power. See 2 Farrand 123 (remarks of John Dickinson); cf. *ante*, at 12, n. 9, and 36, n. 27.

The Qualifications Clauses do prevent the individual States from abolishing all eligibility requirements for Congress. This restriction on state power reflects the fact that when the people of one State send immature, disloyal, or unknowledgeable representatives to Congress, they jeopardize not only their own interests but also the interests of the people of other States. Because Congress wields power over all the States, the people of each State need some guarantee that the legislators elected by the people of other States will meet minimum standards of competence. The Qualifications Clauses provide that guarantee: they list the requirements that the Framers considered essential to protect the competence of the National Legislature.¹¹

If the people of a State decide that they would like their representatives to possess additional qualifications, however, they have done nothing to frustrate the policy behind the Qualifications Clauses. Anyone who possesses all of the constitutional qualifications, plus some qualifications required by state law, still has all of the federal qualifications. Accordingly, the fact that the Constitution specifies certain qualifications that the Framers deemed necessary to protect the competence of the National Legislature does not imply that it strips the people of the individual States of the power to protect their own interests by adding other requirements for their own representatives.

The people of other States could legitimately complain if the people of Arkansas decide, in a particular election, to send a 6-year-old to Congress. But the Constitution

¹¹ Thus, the age requirement was intended to ensure that Members of Congress were people of mature judgment and experience. See, e.g., 1 Farrand 375 (remarks of George Mason at the Philadelphia Convention); 3 *id.*, at 147 (remarks of James McHenry before the Maryland House of Delegates). The citizenship requirement was intended both to ensure that Members of Congress were familiar with the country and that they were not unduly susceptible to foreign influence. See, e.g., 2 *id.*, at 216 (remarks of George Mason). The inhabitancy requirement was intended to produce a National Legislature whose Members, collectively, had a local knowledge of all the States. See, e.g., The Federalist No. 56 (Madison). The Ineligibility Clause was intended to guard against corruption. See, e.g., 1 Farrand 381 (remarks of Alexander Hamilton).

gives the people of other States no basis to complain if the people of Arkansas elect a freshman representative in preference to a long-term incumbent. That being the case, it is hard to see why the rights of the people of other States have been violated when the people of Arkansas decide to enact a more general disqualification of long-term incumbents. Such a disqualification certainly is subject to scrutiny under other constitutional provisions, such as the First and Fourteenth Amendments. But as long as the candidate whom they send to Congress meets the constitutional age, citizenship, and inhabitancy requirements, the people of Arkansas have not violated the Qualifications Clauses.

This conclusion is buttressed by our reluctance to read constitutional provisions to preclude state power by negative implication. The very structure of the Constitution counsels such hesitation. After all, §10 of Article I contains a brief list of *express* prohibitions on the States. Cf. *Cipollone v. Liggett Group, Inc.*, 505 U.S. ____ (1992) (STEVENS, J.) (slip op., at 11) (applying the *expressio unius* maxim to conclude that Congress' inclusion of an express pre-emption clause in a federal statute implies that state laws beyond the reach of that clause are not pre-empted); *Nevada v. Hall*, 440 U.S. 410, 425 (1979) (STEVENS, J.) (suggesting that in light of the Tenth Amendment and the Constitution's express prohibitions on the States, "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers"). Many of the prohibitions listed in §10, moreover, might have been thought to be implicit in other constitutional provisions or in the very nature of our federal system. Compare, e.g., Art. II, §2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties") and Art. I, §8, cl. 5 ("The Congress shall have Power . . . [t]o coin Money") with Art. I, §10, cl. 1 ("No State shall enter into any Treaty" and "No State shall . . . coin Money"); see also Art. VI, cl. 2 (explicitly declaring that state law cannot override the Constitution). The fact that the Framers nonetheless made these prohibitions express confirms that one should not lightly read provisions like the Qualifications Clauses as implicit deprivations of state power. See generally *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 249 (1833).¹²

The majority responds that "a patchwork of state qualifications" would "undermin[e] the uniformity and the national character that the Framers envisioned and sought to ensure." *Ante*, at 44. Yet the Framers thought it perfectly consistent with the "national character" of Congress for the Senators and Representatives from each State to be chosen by the legislature or the people of that State. The majority never explains

why Congress' fundamental character permits this state-centered system, but nonetheless prohibits the people of the States and their state legislatures from setting any eligibility requirements for the candidates who seek to represent them.

As for the majority's related assertion that the Framers intended qualification requirements to be uniform, this is a conclusion, not an argument. Indeed, it is a conclusion that the Qualifications Clauses themselves contradict. At the time of the framing, and for some years thereafter, the Clauses' citizenship requirements incorporated laws that varied from State to State. Thus, the Qualifications Clauses themselves made it possible that a person would be qualified to represent State A in Congress even though a similarly situated person would not be qualified to represent State B.

To understand this point requires some background. Before the Constitution was adopted, citizenship was controlled entirely by state law, and the different States established different criteria. See J. Kettner, *Development of American Citizenship, 1608-1870*, pp. 213-218 (1978). Even after the Constitution gave Congress the power to "establish an uniform Rule of Naturalization . . . throughout the United States," Art. I, §8, cl. 4, Congress was under no obligation to do so, and the Framers surely expected state law to continue in full force unless and until Congress acted. Cf. *Sturges v. Crowninshield*, 4 Wheat. 122, 196 (1819) (so interpreting the other part of §8, cl. 4, which empowers Congress to establish "uniform Laws on the subject of Bankruptcies").¹³ Accordingly, the constitutional requirement that Members of Congress be United States citizens meant different things in different States. The very first contested-election case in the House of Representatives, which involved the citizenship of a would-be Congressman from South Carolina, illustrates this principle. As Representative James Madison told his colleagues, "I take it to be a clear point, that we are to be guided, in our decision, by the laws and constitution of South Carolina, so far as they can guide us; and where the laws do not expressly guide us, we must be guided by principles of a general nature . . ." *Cases of Contested Elections in Congress* 32 (M. Clarke & D. Hall eds. 1834) (reporting proceedings from May 22, 1789).

Even after Congress chose to exercise its power to prescribe a uniform route to naturalization, the durational element of the citizenship requirement in the Qualifications Clauses ensured that variances in state law would continue to matter. Thus, in 1794 the Senate refused to seat Albert Gallatin because, owing to the individual peculiarities of the laws of the two relevant States, he had not been a citizen for the required nine years. *Id.*, at 859-862, 867 (reporting proceedings from February 20 and 28, 1794).

Even if the Qualifications Clauses had not themselves incorporated nonuniform requirements, of course, there

¹²The principle that the Constitution rests on the consent of the people of the States points in the same direction. Both the process of selecting delegates to the Philadelphia Convention and the ratification procedure erected by Article VII were designed to let the States and the people of the States protect their interests. Lest those protections be evaded, one should not be quick to read the Qualifications Clauses as imposing unstated prohibitions that pre-empt all state qualifications laws. Cf. L. Tribe, *American Constitutional Law* §6-25, p. 480 (2d ed. 1988) (arguing that courts should hesitate to read federal statutes to pre-empt state law, because "to give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) relied to protect states' interests"); *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (applying this argument).

¹³Even when Congress enacted the first federal naturalization law in 1790, it left open the possibility that the individual States could establish more lenient standards of their own for admitting people to citizenship. While Hamilton had suggested that Congress' power to "establish an uniform Rule" logically precluded the States from deviating downward from the rule that Congress established, see *The Federalist* No. 32, at 199, the early cases on this question took the opposite view. See *Collet v. Collet*, 2 Dall. 294, 296 (CC Pa. 1792) (Wilson, Blair, and Peters, JJ.). States therefore continued to enact naturalization laws of their own until 1795, when Congress passed an exclusive naturalization law. See J. Kettner, *Development of American Citizenship, 1608-1870*, pp. 242-243 (1978).

would still be no basis for the assertion of the plurality below that they mandate "uniformity in qualifications." See 316 Ark. 251, 265, 872 S. W. 2d 349, 356 (1994). The Clauses wholly omit the exclusivity provision that, according to both the plurality below and today's majority, was their central focus. In fact, neither the text nor the apparent purpose of the Qualifications Clauses does anything to refute Thomas Jefferson's elegant legal analysis:

"Had the Constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the Constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State." Letter to Joseph C. Cabell (Jan. 31, 1814), in 14 Writings of Thomas Jefferson 82-83 (A. Lipscomb ed. 1904).¹⁴

B

Although the Qualifications Clauses neither state nor imply the prohibition that it finds in them, the majority infers from the Framers' "democratic principles" that the Clauses must have been generally understood to preclude the people of the States and their state legislatures from prescribing any additional qualifications for their representatives in Congress. But the majority's evidence on this point establishes only two more modest propositions: (1) the Framers did not want the Federal Constitution itself to impose a broad set of disqualifications for congressional office, and (2) the Framers did not want the Federal Congress to be able to supplement the few disqualifications that the Constitution does set forth. The logical conclusion is simply that the Framers did not want the people of the States and their state legislatures to be constrained by too many qualifications imposed at the national level. The evidence does not support the majority's more sweeping conclusion that the Framers intended to bar the people of the States and their state legislatures from adopting additional eligibility requirements to help narrow their own choices.

I agree with the majority that Congress has no power to prescribe qualifications for its own Members. This fact, however, does not show that the Qualifications Clauses contain a hidden exclusivity provision. The reason for Congress' incapacity is not that the Qualifications Clauses deprive Congress of the authority to set

qualifications, but rather that nothing in the Constitution grants Congress this power. In the absence of such a grant, Congress may not act. But deciding whether the Constitution denies the qualification-setting power to the States and the people of the States requires a fundamentally different legal analysis.

Despite the majority's claims to the contrary, see *ante*, at 16, n. 12, this explanation for Congress' incapacity to supplement the Qualifications Clauses is perfectly consistent with the reasoning of *Powell v. McCormack*, 395 U. S. 486 (1969). *Powell* concerned the scope of Article I, §5, which provides that "[e]ach House [of Congress] shall be the Judge of the Elections, Returns and Qualifications of its own Members." As the majority itself recognizes, "[t]he principal issue [in *Powell*] was whether the power granted to each House in Art. I, §5 . . . includes the power to impose qualifications other than those set forth in the text of the Constitution." *Ante*, at 7. Contrary to the majority's suggestion, then, the critical question in *Powell* was whether §5 conferred a qualification-setting power—not whether the Qualifications Clauses took it away. Compare *Powell*, *supra*, at 519 (describing the question before the Court as "what power the Constitution confers upon the House through Art. I, §5") and 536 (describing the Court's task as "determining the meaning of Art. I, §5") with *ante*, at 8 and 11-12, n. 8 (suggesting that *Powell* held that the Qualifications Clauses "limit the power of the House to impose additional qualifications"). See also *Buckley v. Valeo*, 424 U. S. 1, 133 (1976) (taking my view of *Powell*).

Powell's analysis confirms this point. After summarizing a large quantity of historical material bearing on the original understanding of what it meant for a legislature to act as "the Judge" of the qualifications of its members, see 395 U. S., at 521-531, *Powell* went on to stress that the Philadelphia Convention specifically rejected proposals to grant Congress the power to pass laws prescribing additional qualifications for its members, and that the Convention rejected these proposals on the very same day that it approved the precursor of §5. See *id.*, at 533-536. Given this historical evidence, the *Powell* Court refused to read §5 as empowering the House to prescribe such additional qualifications in its capacity as "Judge." And if nothing in the Constitution gave the House this power, it inevitably followed that the House could not exercise it. Despite the majority's claims, then, *Powell* itself rested on the proposition that the institutions of the Federal Government enjoy only the powers that are granted to them. See also *ante*, at 12, n. 9 (describing the Qualifications Clauses merely as an independent basis for the result reached in *Powell*).¹⁵

¹⁵The majority also errs in its interpretation of *Nixon v. United States*, 506 U. S. ____ (1993). See *ante*, at 16, n. 12. In dictum, *Nixon* did refer to "the fixed meaning of '[q]ualifications' set forth in Art. I, §2." 506 U. S., at ____ (slip op., at 12). But as both the surrounding context and the internal punctuation of this passage make clear, *Nixon* was referring to the meaning of the word "Qualifications" in §5; that term, after all, does not even appear in the House Qualifications Clause of §2. Thus, *Nixon* merely said that §5 directs the House to judge the qualifications "set forth in Art. I, §2," and not qualifications of its own invention. See also *infra*, at 51. There would have been no occasion for *Nixon* to extend *Powell*: the only point of its discussion was to explain why the question at issue in *Powell* was justiciable, while the question at issue in *Nixon* (which concerned impeachment) was not.

¹⁴The majority notes Jefferson's concession that state power to supplement the Qualifications Clauses was "one of the doubtful questions on which honest men may differ with the purest motives." See *ante*, at 34, n. 24; 14 Writings of Thomas Jefferson 83 (A. Lipscomb ed. 1904). But while Jefferson cautioned against impugn- ing the motives of people who might disagree with his position, his use of the phrase "[o]f course" suggests that he himself did not entertain serious doubts of its correctness.

The fact that the Framers did not grant a qualification-setting power to Congress does not imply that they wanted to bar its exercise at the state level. One reason why the Framers decided not to let Congress prescribe the qualifications of its own members was that incumbents could have used this power to perpetuate themselves or their ilk in office. As Madison pointed out at the Philadelphia Convention, Members of Congress would have an obvious conflict of interest if they could determine who may run against them. 2 Farrand 250; see also *ante*, at 13, n. 10. But neither the people of the States nor the state legislatures would labor under the same conflict of interest when prescribing qualifications for Members of Congress, and so the Framers would have had to use a different calculus in determining whether to deprive them of this power.

As the majority argues, democratic principles also contributed to the Framers' decision to withhold the qualification-setting power from Congress. But the majority is wrong to suggest that the same principles must also have led the Framers to deny this power to the people of the States and the state legislatures. In particular, it simply is not true that "the source of the qualification is of little moment in assessing the qualification's restrictive impact." *Ante*, at 42. There is a world of difference between a self-imposed constraint and a constraint imposed from above.

Congressional power over qualifications would have enabled the representatives from some States, acting collectively in the National Legislature, to prevent the people of another State from electing their preferred candidates. The John Wilkes episode in 18th-century England illustrates the problems that might result. As the majority mentions, Wilkes's district repeatedly elected him to the House of Commons, only to have a majority of the representatives of other districts frustrate their will by voting to exclude him. See *ante*, at 9. Americans who remembered these events might well have wanted to prevent the National Legislature from fettering the choices of the people of any individual State (for the House of Representatives) or their state legislators (for the Senate).

Yet this is simply to say that qualifications should not be set at the national level for offices whose occupants are selected at the state level. The majority never identifies the democratic principles that would have been violated if a state legislature, in the days before the Constitution was amended to provide for the direct election of Senators, had imposed some limits of its own on the field of candidates that it would consider for appointment.¹⁶ Likewise, the majority does not explain why democratic principles forbid the people of a State from adopting additional eligibility requirements to help narrow their choices among candidates seeking to represent them in the House of Representatives. Indeed, the invocation of democratic principles to invalidate Amendment 73 seems particularly difficult in the present case, because Amendment 73 remains fully within the control of the people of Arkansas. If they wanted to repeal it (despite the 20-point margin by which they enacted it less than three years ago), they could do so by a simple majority vote. See Ark. Const., Amdt. 7.

The majority appears to believe that restrictions on eligibility for office are inherently undemocratic. But the Qualifications Clauses themselves prove that the Framers did not share this view; eligibility requirements to which the people of the States consent are perfectly consistent with the Framers' scheme. In fact, we have described "the authority of the people of the States to determine the qualifications of their most important government officials" as "an authority that lies at the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (internal quotation marks omitted) (refusing to read federal law to preclude States from imposing a mandatory retirement age on state judges who are subject to periodic retention elections). When the people of a State themselves decide to restrict the field of candidates whom they are willing to send to Washington as their representatives, they simply have not violated the principle that "the people should choose whom they please to govern them." See 2 Elliot 257 (remarks of Alexander Hamilton at the New York convention).

At one point, the majority suggests that the principle identified by Hamilton encompasses not only the electorate's right to choose, but also "the egalitarian concept that the opportunity to be elected [is] open to all." See *ante*, at 13-14; see also *ante*, at 41-42. To the extent that the second idea has any content independent of the first, the majority apparently would read the Qualifications Clauses to create a personal right to be a candidate for Congress, and then to set that right above the authority of the people of the States to prescribe eligibility requirements for public office. But we have never suggested that "the opportunity to be elected" is open even to those whom the voters have decided not to elect. On that rationale, a candidate might have a right to appear on the ballot in the general election even though he lost in the primary. But see *Storer v. Brown*, 415 U.S. 724, 726, n. 16 (1974); see also *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972) (rejecting the proposition that there is any fundamental right to be a candidate, separate and apart from the electorate's right to vote). Thus, the majority ultimately concedes that its "egalitarian concept" derives entirely from the electorate's right to choose. See *ante*, at 13, n. 11; see also *ante*, at 41 (deriving the "egalitarian ideal" from the proposition that the Qualifications Clauses do not unduly "fetter the judgment . . . of the people" (quoting *The Federalist* No. 57, at 351)). If the latter is not violated, then neither is the former.

In seeking ratification of the Constitution, James Madison did assert that "[u]nder these reasonable limitations [set out in the House Qualifications Clause], the door of this part of the federal government is open to merit of every description . . ." *The Federalist* No. 52, at 326. The majority stresses this assertion, and others to the same effect, in support of its "egalitarian concept." See *ante*, at 13-14, 41-42, and n. 30. But there is no reason to interpret these statements as anything more than claims that the Constitution itself imposes relatively few disqualifications for congressional office.¹⁷

¹⁶Oregon, for instance, pioneered a system in which the state legislature bound itself to appoint the candidates chosen in a statewide vote of the people. See Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 108 (1991). The majority is in the uncomfortable position of suggesting that this system violated "democratic principles."

¹⁷For instance, the majority quotes Noah Webster's observation that under the Constitution, "the places of senators are wisely left open to all persons of suitable age and merit, and who have been citizens of the United States for nine years." See *ante*, at 42, n. 30 (quoting "A Citizen of America" (Oct. 17, 1787), in 1 Debate on the Constitution 129, 142 (B. Bailyn ed. 1993) (hereinafter *Bailyn*)). But there is no reason to read Webster as denying the power of state

One should not lightly assume that Madison and his colleagues, who were attempting to win support at the state level for the new Constitution, were proclaiming the inability of the people of the States or their state legislatures to prescribe any eligibility requirements for their own Representatives or Senators. Instead, they were merely responding to the charge that the Constitution was undemocratic and would lead to aristocracies in office. Cf. *ante*, at 11 (referring to "the antifederalist charge that the new Constitution favored the wealthy and well-born"). The statement that the qualifications imposed in the Constitution are not unduly restrictive hardly implies that the Constitution withdrew the power of the people of each State to prescribe additional eligibility requirements for their own Representatives if they so desired.

In fact, the authority to narrow the field of candidates in this way may be part and parcel of the right to elect Members of Congress. That is, the right to choose may include the right to winnow. See Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 107-109 (1991).

To appreciate this point, it is useful to consider the Constitution as it existed before the Seventeenth Amendment was adopted in 1913. The Framers' scheme called for the legislature of each State to choose the Senators from that State. Art. I, §3, cl. 1. The majority offers no reason to believe that state legislatures could not adopt prospective rules to guide themselves in carrying out this responsibility; not only is there no express language in the Constitution barring legislatures from passing laws to narrow their choices, but there also is absolutely no basis for inferring such a prohibition. Imagine the worst-case scenario: a state legislature, wishing to punish one of the Senators from its State for his vote on some bill, enacts a qualifications law that the Senator does not satisfy. The Senator would still be able to serve out his term; the Constitution provides for senators to be chosen for 6-year terms, Art. I, §3, cl. 1, and a person who has been seated in Congress can be removed only if two-thirds of the Members of his House vote to expel him, §5, cl. 2. While the Senator would be disqualified from seeking reappointment, under the Framers' Constitution the state legislature already enjoyed unfettered discretion to deny

legislatures to pass resolutions limiting the field of potential candidates that they would consider for appointment to the Senate. Indeed, it seems implausible that Webster would have been invoking the majority's vision of "democratic principles" in support of the constitutional provisions calling for senators to be appointed by the various state legislatures rather than being elected directly by the people of the States.

Similarly, the majority quotes a newspaper piece written by John Stevens, Jr., to the people of New York. See *ante*, at 41. But Stevens gave the following explanation for his assertion that "[n]o man who has real merit . . . need despair" under the system erected by the Constitution: "He first distinguishes himself amongst his neighbours at township and county meeting; he is next sent to the State Legislature. In this theatre his abilities . . . are . . . displayed to the views of every man in the State: from hence his ascent to a seat in Congress becomes easy and sure." "Americanus," *Daily Advertiser*, Dec. 12, 1787, in 1 *Bailyn* 487, 492. As the States indisputably controlled eligibility requirements for membership in the various state legislatures, and indeed had established some disqualifications, I do not read Stevens to be saying that they were barred from doing the same thing with respect to Congress. Without addressing whether the people of the States may supplement the Qualifications Clauses, Stevens was merely praising the Constitution for imposing few such requirements of its own.

him reappointment anyway. Instead of passing a qualifications law, the legislature could simply have passed a resolution declaring its intention to appoint someone else the next time around. Thus, the legislature's power to adopt laws to narrow its own choices added nothing to its general appointment power.

While it is easier to coordinate a majority of state legislators than to coordinate a majority of qualified voters, the basic principle should be the same in both contexts. Just as the state legislature enjoyed virtually unfettered discretion over whom to appoint to the Senate under Art. I, §3, so the qualified voters of the State enjoyed virtually unfettered discretion over whom to elect to the House of Representatives under Art. I, §2. If there is no reason to believe that the Framers' Constitution barred state legislatures from adopting prospective rules to narrow their choices for Senator, then there is also no reason to believe that it barred the people of the States from adopting prospective rules to narrow their choices for Representative. In addition, there surely is no reason to believe that the Senate Qualifications Clause suddenly acquired an exclusivity provision in 1913, when the Seventeenth Amendment was adopted. Now that the people of the States are charged with choosing both Senators and Representatives, it follows that they may adopt eligibility requirements for Senators as well as for Representatives.

I would go further, for I see nothing in the Constitution that precludes the people of each State (if they so desire) from authorizing their elected state legislators to prescribe qualifications on their behalf. If the people of a State decide that they do not trust their state legislature with this power, they are free to amend their state constitution to withdraw it. This arrangement seems perfectly consistent with the Framers' scheme. From the time of the Framing until after the Civil War, for example, the Federal Constitution did not bar state governments from abridging the freedom of speech or the freedom of the press, even when those freedoms were being exercised in connection with congressional elections. It was the state constitutions that determined whether state governments could silence the supporters of disfavored congressional candidates, just as it was the state constitutions that determined whether the States could persecute people who held disfavored religious beliefs or could expropriate property without providing just compensation. It would not be at all odd if the state constitutions also determined whether the state legislature could pass qualifications statutes.

But one need not agree with me that the people of each State may delegate their qualification-setting power in order to uphold Arkansas' Amendment 73. Amendment 73 is not the act of a state legislature; it is the act of the people of Arkansas, adopted at a direct election and inserted into the state constitution. The majority never explains why giving effect to the people's decision would violate the "democratic principles" that undergird the Constitution. Instead, the majority's discussion of democratic principles is directed entirely to attacking eligibility requirements imposed on the people of a State by an entity other than themselves.

The majority protests that any distinction between the people of the States and the state legislatures is "untenable" and "astonishing." See *ante*, at 30, n. 19. In the limited area of congressional elections, however, the Framers themselves drew this distinction: they specifically provided for Senators to be chosen by the state

legislatures and for Representatives to be chosen by the people. In the context of congressional elections, the Framers obviously saw a meaningful difference between direct action by the people of each State and action by their state legislatures.

Thus, even if one believed that the Framers intended to bar state legislatures from adopting qualifications laws that restrict the people's choices, it would not follow that the people themselves are precluded from agreeing upon eligibility requirements to help narrow their own choices. To be sure, if the Qualifications Clauses were exclusive, they would bar all additional qualifications, whether adopted by popular initiative or by statute. But the majority simply assumes that if state legislatures are barred from prescribing qualifications, it must be because the Qualifications Clauses are exclusive. It would strain the text of the Constitution far less to locate the bar in Article I, §2 and the Seventeenth Amendment instead: one could plausibly maintain that qualification requirements imposed by state legislatures violate the constitutional provisions entrusting the selection of Members of Congress to the people of the States, even while one acknowledges that qualification requirements imposed by the people themselves are perfectly constitutional. The majority never justifies its conclusion that "democratic principles" require it to reject even this intermediate position.

C

In addition to its arguments about democratic principles, the majority asserts that more specific historical evidence supports its view that the Framers did not intend to permit supplementation of the Qualifications Clauses. But when one focuses on the distinction between congressional power to add qualifications for congressional office and the power of the people or their state legislatures to add such qualifications, one realizes that this assertion has little basis.

In particular, the detail with which the majority recites the historical evidence set forth in *Powell v. McCormack*, 395 U.S. 486 (1969), should not obscure the fact that this evidence has no bearing on the question now before the Court. As the majority ultimately concedes, see *ante*, at 12, 15, 18, it does not establish "the Framers' intent that the qualifications in the Constitution be fixed and exclusive," *ante*, at 9-10; it shows only that the Framers did not intend Congress to be able to enact qualifications laws.¹⁸ If anything, the

solidity of the evidence supporting *Powell's* view that Congress lacks the power to supplement the constitutional disqualifications merely highlights the weakness of the majority's evidence that the States and the people of the States also lack this power.

1

To the extent that the records from the Philadelphia Convention itself shed light on this case, they tend to hurt the majority's case. The only evidence that directly bears on the question now before the Court comes from the Committee of Detail, a five-member body that the Convention charged with the crucial task of drafting a Constitution to reflect the decisions that the Convention had reached during its first two months of work. A document that Max Farrand described as "[a]n early, perhaps the first, draft of the committee's work" survived among the papers of George Mason. 1 Farrand xxiii, n. 36. The draft is in the handwriting of Edmund Randolph, the chairman of the Committee, with emendations in the hand of John Rutledge, another member of the Committee. As Professor Farrand noted, "[e]ach item in this document . . . is either checked off or crossed out, showing that it was used in the preparation of subsequent drafts." 2 *id.*, at 137, n. 6; see also W. Meigs, *The Growth of the Constitution in the Federal Convention of 1787*, pp. I-IX (1900) (providing a facsimile of the document).

The document is an extensive outline of the Constitution. Its treatment of the National Legislature is divided into two parts, one for the "House of Delegates" and one for the Senate. The Qualifications Clause for the House of Delegates originally read as follows: "The qualifications of a delegate shall be the age of twenty five years at least, and citizenship: and any person possessing these qualifications may be elected except [blank space]." *Id.*, at II (emphasis added). The draft-

prior observation that the power to set qualifications "forms no part of the power to be conferred upon the national government." See *The Federalist* No. 60, at 371 (emphasis added). Indeed, only if "the legislature" to which Hamilton was referring is Congress can one make sense of his remark that the qualifications of voters as well as Congressmen are "fixed in the Constitution" and "unalterable by the legislature." Hamilton surely knew that the States or the people of the States control eligibility for the franchise. See Art. I, §2, cl. 1.

The majority does omit the context necessary to understand one aspect of the historical evidence presented in *Powell*. The majority quotes *Powell's* observation that "on the eve of the Constitutional Convention, English precedent stood for the proposition that 'the law of the land had regulated the qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.'" 395 U.S., at 528 (quoting 16 *Parliamentary History of England* 589, 590 (1769)); see *ante*, at 9. The English rule seems of only marginal relevance: the pre-existing rule in America—that States could add qualifications for their representatives in Congress, see n. 3, *supra*, while Congress itself could not—is surely more important. But in any event, *Powell* did not claim that the English rule deemed parliamentary qualifications to be fixed in the country's (unwritten) constitution, beyond the reach of a properly enacted law. Instead, qualifications were "fixed" rather than "occasional" only in the sense that neither House of Parliament could "exclude members-elect for general misconduct not within standing qualifications." *Powell*, 395 U.S., at 528. The English rule, in other words, was simply that when sitting as the judge of its members' qualifications, each House of Parliament could do no more than administer the pre-existing laws that defined those qualifications, see *id.*, at 529, for "one House of Parliament cannot create a disability unknown to the law." 1. Plucknett, *Taswell-Langmead's English Constitutional History* 585 (11th ed. 1960); cf. *INS v. Chadha*, 462 U.S. 919 (1983). This history was relevant to *Powell* (which dealt with the grounds on which one House of Congress could exclude a member-elect), but it is not relevant to this case.

¹⁸ For instance, the majority quotes at length from the debate that arose in the Philadelphia Convention when the Committee of Detail proposed the following clause: "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." See 2 Farrand 179, 248-251; *ante*, at 10-11. The defeat of this proposal—like the defeat of Gouverneur Morris' motion to drop the words "with regard to property" from the clause, so as to empower Congress to enact qualifications of any sort—simply reflects the Framers' decision not to grant Congress the power to supplement the constitutional qualifications. Considered out of context, some of James Madison's comments during the debate might be thought to go farther. See *ante*, at 10. But the majority itself properly dispels this false impression. See *ante*, at 13, n. 10; see also *Powell v. McCormack*, 395 U.S., at 534.

Likewise, *Powell* drew support from Alexander Hamilton's comments in *The Federalist* No. 60, which the majority also quotes. See *ante*, at 11. But as the majority concedes, when Hamilton wrote that "[t]he qualifications of the persons who may choose or be chosen [for Congress] . . . are defined and fixed in the Constitution, and are unalterable by the legislature," he was merely restating his

er(s) of this language apparently contemplated that the Committee might want to insert some exceptions to the exclusivity provision. But rather than simply deleting the word "except"—as it might have done if it had decided to have no exceptions at all to the exclusivity provision—the Committee deleted the exclusivity provision itself. In the document that has come down to us, all the words after the colon are crossed out. *Ibid.*

The majority speculates that the exclusivity provision may have been deleted as superfluous. See *ante*, at 36, n. 27.¹⁹ But the same draft that contained the exclusivity language in the House Qualifications Clause contained no such language in the Senate Qualifications Clause. See 2 Farrand 141. Thus, the draft appears to reflect a deliberate judgment to distinguish between the House qualifications and the Senate qualifications, and to make only the former exclusive. If so, then the deletion of the exclusivity provision indicates that the Committee expected neither list of qualifications to be exclusive.

The majority responds that the absence of any exclusivity provision in the Committee's draft of the Senate Qualifications Clause merely reflected the fact that "senators, unlike Representatives, would not be chosen by popular election." *Ante*, at 36-37, n. 27. I am perfectly prepared to accept this explanation: the drafter(s) may well have thought that state legislatures should be prohibited from constricting the people's choices for the House of Representatives, but that no exclusivity provision was necessary on the Senate side because state legislatures would already have unfettered control over the appointment of Senators. To accept this explanation, however, is to acknowledge that the exclusivity provision in the Committee's draft of the House Qualifications Clause was not thought to be mere surplusage. It is also to acknowledge that the Senate Qualifications Clause in the Committee's draft—"the qualification of a senator shall be the age of 25 years at least: citizenship in the united states: and property to the amount of [blank space]," 2 Farrand 141—did not carry any implicit connotation of exclusivity. In short, the majority's own explanation for the difference between the two Qualifications Clauses in the Committee's draft is fundamentally at odds with the *expressio unius* argument on which the majority rests its holding.

2

Unable to glean from the Philadelphia Convention any direct evidence that helps its position, the majority seeks signs of the Framers' unstated intent in the Framers' comments about four other constitutional provisions. See *ante*, at 29-33 (citing Art. I, §2, cl. 1; §4, cl. 1; §5, cl. 1; and §6, cl. 1). The majority infers from these provisions that the Framers wanted "to minimize the possibility of state interference with federal elections." *Ante*, at 29. But even if the majority's reading of its evidence were correct, the most that one could

infer is that the Framers did not want state legislatures to be able to prescribe qualifications that would narrow the people's choices. See *supra*, at 39-43. However wary the Framers might have been of permitting state legislatures to exercise such power, there is absolutely no reason to believe that the Framers feared letting the people themselves exercise this power. Cf. The Federalist No. 52, p. 326 (Madison) ("it cannot be feared that the people of the States will alter this [electoral-qualification] part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution").

In any event, none of the provisions cited by the majority is inconsistent with state power to add qualifications for congressional office. First, the majority cites the constitutional requirement that congressional salaries be "ascertained by Law, and paid out of the Treasury of the United States." Art. I, §6, cl. 1. Like the Qualifications Clauses themselves, however, the salary provision can be seen as simply another means of protecting the competence of the National Legislature. As reflected in the majority's own evidence, see *ante*, at 30-31; see also 1 Farrand 373 (remarks of James Madison), one of the recurring themes of the debate over this provision was that if congressional compensation were left up to the States, parsimonious States might reduce salaries so low that only incapable people would be willing to serve in Congress.

As the majority stresses, some delegates to the Philadelphia Convention did argue that leaving congressional compensation up to the various States would give Members of Congress "an improper dependence" upon the States. *Id.*, at 216 (remarks of James Madison); *ante*, at 30-31. These delegates presumably did not want state legislatures to be able to tell the members of Congress from their State, "Vote against Bill A or we will slash your salary"; such a power would approximate a power of recall, which the Framers denied to the States when they specified the terms of Members of Congress. The Framers may well have thought that state power over salary, like state power to recall, would be inconsistent with the notion that Congress was a national legislature once it assembled. But state power over initial eligibility requirements does not raise the same concerns: it was perfectly coherent for the Framers to leave selection matters to the state level while providing for Members of Congress to draw a federal salary once they took office. Thus, the Compensation Clause seems wholly irrelevant; contrary to the majority's suggestion, see *ante*, at 32, n. 21, it does not address elections at all.

Second, the majority gives passing mention to the Elector-Qualifications Clause of Article I, §2, which specifies that in each State, the voters in House elections "shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature." But the records of the Philadelphia Convention provide no evidence for the majority's assertion that the purpose of this clause was "to prevent discrimination against federal electors." See *ante*, at 29.²⁰ In fact, the Clause

¹⁹The majority also argues that in any event, the views of the members of the Committee "tell[] us little about the views of the Convention as a whole." *Ante*, at 36, n. 27. But our task is simply to determine whether at the time of the framing, the language of the Qualifications Clauses would have been commonly understood to contain an exclusivity provision. The surviving records suggest that the members of the Committee of Detail did not understand the final Qualifications Clauses to be exclusive, and the majority offers no reason to think that their understanding of language was unusual for their time.

²⁰The majority inaccurately reports James Madison's explanation of the Elector-Qualifications Clause in The Federalist No. 52. Madison neither mentioned nor addressed the consequences of "allowing States to differentiate between the qualifications for state and federal electors." See *ante*, at 29. Instead, he addressed the

may simply have been a natural concomitant of one of the Framers' most famous decisions. At the Convention, there was considerable debate about whether Members of the House of Representatives should be selected by the state legislatures or directly by the voters of each State. Taken as a whole, the first Clause of Article I, §2—including the elector-qualifications provision—implements the Framers' decision. It specifies that the Representatives from each State are to be chosen by the State's voters (that is, the people eligible to participate in elections for the most numerous branch of the state legislature).

Third, the majority emphasizes that under Article I, §5, "[e]ach House [of Congress] shall be the Judge of the Elections, Returns and Qualifications of its own Members." See *ante*, at 24, 32-33, 44. There was no recorded discussion of this provision in the Philadelphia Convention, and it appears simply to adopt the practice of England's Parliament. See n. 18, *supra*. According to the majority, however, §5 implies that the Framers could not have intended state law ever to "provide the standard for judging a Member's eligibility." *Ante*, at 33.

My conclusion that States may prescribe eligibility requirements for their Members of Congress does not necessarily mean that the term "Qualifications," as used in Article I, §5, includes such state-imposed requirements. One surely could read the term simply to refer back to the requirements that the Framers had just listed in the Qualifications Clauses, and not to encompass whatever requirements States might add on their own. See *United States v. Nixon*, 506 U.S. ___, ___, (1993) (slip op., at 12-13) (dictum) (asserting that the context of §5 demonstrates that "the word '[q]ualifications' . . . was of a precise, limited nature" and referred only to the qualifications previously "set forth in Art. I, §2"). The Framers had deemed the constitutional qualifications essential to protect the competence of Congress, and hence the national interest. It is quite plausible that the Framers would have wanted each House to make sure that its Members possessed these qualifica-

tions, but would have left it to the States to enforce whatever qualifications were imposed at the state level to protect state interests.

But even if this understanding of §5 is incorrect. I see nothing odd in the notion that a House of Congress might have to consider state law in judging the "Qualifications" of its Members. In fact, §5 itself refutes the majority's argument. Because it generally is state law that determines what is necessary to win an election and whether any particular ballot is valid, each House of Congress clearly must look to state law in judging the "Elections" and "Returns" of its Members. It would hardly be strange if each House had to do precisely the same thing in judging "Qualifications." Indeed, even on the majority's understanding of the Constitution, at the time of the Framing all "Qualifications" questions that turned on issues of citizenship would have been governed by state law. See *supra*, at 29-31.

More generally, there is no basis for the majority's assertion that the Framers would not have charged "federal tribunals" with the task of "judging . . . questions concerning rights which depend on state law." See *ante*, at 33. Cases involving questions of federal law hardly exhaust the categories of cases that the Framers authorized the federal courts to decide. See Art. III, §2, cl. 1. The Founding generation, moreover, seemed to assign relatively little importance to the constitutional grant of jurisdiction over "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority." *Ibid.* The First Congress never even implemented this jurisdictional grant at the trial level; it was not until 1875 that Congress "revolutionized the concept of the federal judiciary" by giving federal courts broad jurisdiction over suits arising under federal law. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 962 (3d ed. 1988). By contrast, the founding generation thought it important to implement immediately the constitutional grant of diversity jurisdiction, in which the rules of decision generally come entirely from state law. See Judiciary Act of 1789, 1 Stat. 73, 78, 92; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-80 (1938).

The fourth and final provision relied upon by the majority is the Clause giving Congress the power to override state regulations of "[t]he Times, Places and Manner of holding [congressional] Elections." Art. I, §4, cl. 1. From the fact that the Framers gave Congress the power to "make or alter" these state rules of election procedure, the majority infers that the Framers would also have wanted Congress to enjoy override authority with respect to any matters of substance that were left to the States. See *ante*, at 31. As Congress enjoys no "make or alter" powers in this area, the majority concludes that the Framers must not have thought that state legislatures would be able to enact qualifications laws.

But the Framers provided for congressional override only where they trusted Congress more than the States. Even respondents acknowledge that "the primary reason" for the "make or alter" power was to enable Congress to ensure that States held elections in the first place. See Tr. of Oral Arg. 51; see also *supra*, at 20, and n. 10. The Framers did trust Congress more than the States when it came to preserving the Federal Government's own existence; to advance this interest, they had to give Congress the capacity to prescribe both

problems that would have arisen if the Constitution had assigned control over the qualifications of voters in House elections to the state legislatures rather than to the people of each State. It was such an arrangement that, in Madison's view, "would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone." *The Federalist* No. 52, at 326; cf. *ante*, at 29. The Elector-Qualifications Clause avoided this problem because the various state constitutions controlled who could vote in elections for the most numerous branch of the state legislature, and no state government could alter these requirements unless the people of the State (through the state constitution) decided to let it do so. See *The Federalist* No. 52, at 326.

Though one obviously could uphold the action of the people of Arkansas without reaching this issue, Madison's comments should not be read to suggest that the Elector-Qualifications Clause bars the people of a State from delegating their control over voter qualifications to the state legislature. The Clause itself refutes this reading; if a state constitution permits the state legislature to set voter qualifications, and if eligibility for the franchise in the State therefore turns on statutory rather than constitutional law, federal electors in the State still must meet the same qualifications as electors for the most numerous branch of the state legislature. Madison could not possibly have disagreed with this understanding of the Clause. Instead, he was simply explaining why, when it came to voter qualifications for House elections, the Framers had not followed the model of Article I, §3, cl. 1, and vested ultimate control with the state legislatures (regardless of what the people of a State might provide in their state constitutions).

the date and the mechanics of congressional elections. As discussed above, however, the Framers trusted the States more than Congress when it came to setting qualifications for Members of Congress. See *supra*, at 35-36. Indeed, the majority itself accepts this proposition. See *ante*, at 55 (acknowledging that the Framers were "particularly concerned" about congressional power to set qualifications).

To judge from comments made at the state ratifying conventions, Congress' "make or alter" power was designed to serve a coordination function in addition to ensuring that the States had at least rudimentary election laws. For instance, George Nicholas argued at the Virginia convention that if regulation of the time of congressional elections had been left exclusively to the States, "there might have been as many times of choosing as there are States," and "such intervals might elapse between the first and last election, as to prevent there being a sufficient number to form a House." 9 Documentary History of the Ratification of the Constitution 920 (J. Kaminski and G. Saladino eds. 1990). For this reason too, if the National Legislature lacked the "make or alter" power, "it might happen that there should be no Congress[,] . . . and this might happen at a time when the most urgent business rendered their session necessary." *Ibid.*; cf. 2 Elliot 535 (remarks of Thomas McKean at the Pennsylvania ratifying convention) (defending §4 on the ground that congressional elections should be "held on the same day throughout the United States, to prevent corruption or undue influence"). Again, however, the desire to coordinate state election procedures did not require giving Congress power over qualifications laws.

The structure of the Constitution also undermines the majority's suggestion that it would have been bizarre for the Framers to give Congress supervisory authority over state time, place, and manner regulations but not over state qualifications laws. Although the Constitution does set forth a few nationwide disqualifications for the office of Presidential elector, see Art. II, §1, cl. 2 ("no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector"), no one contends that these disqualifications implicitly prohibit the States from adding any other eligibility requirements; instead, Article II leaves the States free to establish qualifications for their delegates to the electoral college. See *supra*, at 18-19. Nothing in the Constitution, moreover, gives Congress any say over the additional eligibility requirements that the people of the States or their state legislatures may choose to set. Yet under Article II, "[t]he Congress may determine the Time of chusing the Electors . . ." Art. II, §1, cl. 4.

The majority thus creates an unwarranted divergence between Article I's provisions for the selection of Members of Congress and Article II's provisions for the selection of members of the electoral college. Properly understood, the treatment of congressional elections in Article I parallels the treatment of Presidential elections in Article II. Under Article I as under Article II, the States and the people of the States do enjoy the reserved power to establish substantive eligibility requirements for candidates, and Congress has no power to override these requirements. But just as Article II authorizes Congress to prescribe when the States must select their Presidential electors, so Article I gives Congress the ultimate authority over the times, places, and manner of holding congressional elections.

The majority's only response is that my reading of the Constitution would permit States to use their qualification-setting power to achieve the very result that Congress' "make or alter" power was designed to avoid. According to the majority, States could set qualifications so high that no candidate could meet them, and Congress would be powerless to do anything about it. *Ante*, at 32.

Even if the majority were correct that Congress could not nullify impossible qualifications, however, the Constitution itself proscribes such state laws. The majority surely would concede that under the Framers' Constitution, each state legislature had an affirmative duty to appoint two people to the Senate. See Art. I, §3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ." (emphasis added)); cf. Art. I, §3, cl. 2 ("if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies"). In exactly the same way that §3 requires the States to send people to the Senate, §2 also requires the States to send people to the House. See Art. I, §2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); cf. Art. I, §2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies").

The majority apparently is concerned that (on its reading of the "make or alter" power) Congress would not be able to enforce the constitutional proscription on impossible qualifications; enforcement would instead be relegated to the courts, the Executive Branch, or the political process. But this concern is equally applicable whether one adopts my view of the Qualifications Clauses or the majority's view. Both the majority and I agree that it is unconstitutional for States to establish impossible qualifications for congressional office. Both the majority and I also agree that it is theoretically conceivable that a State might defy this proscription by erecting an impossible qualification. Whether Congress may use its "make or alter" power to override such laws turns entirely on how one reads the "make or alter" power; it has nothing to do with whether one believes that the Qualifications Clauses are exclusive.

It would not necessarily be unusual if the Framers had decided against using Congress' "make or alter" power to guard against state laws that disqualify everyone from service in the House. After all, although this power extended to the times and manner of selecting Senators as well as Representatives, it did not authorize Congress to pick the Senators from a State whose legislature defied its constitutional obligations and refused to appoint anyone. This does not mean that the States had no duty to appoint Senators, or that the States retained the power to destroy the Federal Government by the simple expedient of refusing to meet this duty. It merely means that the Framers did not place the remedy with Congress.²¹

²¹ Likewise, the Constitution requires the States to appoint Presidential electors, Art. II, §1, cl. 2, but it does not provide for any congressional override if the States refuse to do so (or if the States set impossibly high qualifications and then announce that no one meets them).

But the flaws in the majority's argument go deeper. Contrary to the majority's basic premise, Congress can nullify state laws that establish impossible qualifications. If a State actually holds an election and only afterwards purports to disqualify the winner for failure to meet an impossible condition, Congress certainly would not be bound by the purported disqualification. It is up to each House of Congress to judge the "[q]ualifications" of its Members for itself. See Art. I, §5, cl. 1. Even if this task includes the responsibility of judging qualifications imposed by state law, see *supra*, at 50-52, Congress obviously would have not only the power but the duty to treat the unconstitutional state law as a nullity. Thus, Congress could provide the appropriate remedy for the State's defiance, simply by seating the winner of the election.

It follows that the situation feared by the majority would arise only if the State refused to hold an election in the first place, on the ground that no candidate could meet the impossible qualification. But Congress unquestionably has the power to override such a refusal. Under the plain terms of §4, Congress can make a regulation providing for the State to hold a congressional election at a particular time and place, and in a particular manner.²²

3

In discussing the ratification period, the majority stresses two principal data. One of these pieces of evidence is no evidence at all—literally. The majority devotes considerable space to the fact that the recorded ratification debates do not contain any affirmative statement that the States can supplement the constitutional qualifications. See *ante*, at 33-36. For the majority, this void is "compelling" evidence that "unquestionably reflects the Framers' common understanding that States lacked that power." *Ante*, at 33, 36. The majority reasons that delegates at several of the ratifying conventions attacked the Constitution for failing to require Members of Congress to rotate out of office.²³ If sup-

²² Even if there is anything left of the majority's argument on this point, it would still have no bearing on whether the Framers intended to preclude the people of each State from supplementing the constitutional qualifications. Just as the Framers had no fear that the people of a State would destroy congressional elections by entirely disenfranchising themselves, see The Federalist No. 52, at 326, so the Framers surely had no fear that the people of the States would destroy congressional elections by entirely disqualifying all candidates.

²³ As the majority notes, see *ante*, at 60 and 33, n. 22, the Philadelphia Convention had dropped without discussion a portion of the original Randolph Resolutions calling for Members of the House of Representatives "to be incapable of re-election for the space of [blank space] after the expiration of their term of service." 1 Farrand 20. This provision, which at a minimum would have barred all Members of the House from serving consecutive terms, was abandoned without objection when the Convention voted to require House Members to stand for election every three years. See *id.*, at 214-217; see also *id.*, at 362 (opting for 2-year terms instead). Subsequently, indeed, some members of the Convention appeared to be unaware that a rotation requirement had ever been proposed. See 2 *id.*, at 120 (remarks of Gouverneur Morris).

The majority properly does not cite the omission of this nationwide rotation requirement as evidence that the Framers meant to preclude individual States from adopting rotation requirements of their own. Just as individual States could extend the vote to women before the adoption of the Nineteenth Amendment, could prohibit poll taxes before the adoption of the Twenty-fourth Amendment, and could lower the voting age before the adoption of the Twenty-sixth Amendment, so the Framers' decision not to impose a nationwide limit on congressional terms did not itself bar States from adopting limits of their own. See, e.g., Ga. Const. of 1877, §2-602 (adopted Aug. 3, 1943) (reducing voting age to 18 nearly

porters of ratification had believed that the individual States could supplement the constitutional qualifications, the majority argues, they would have blunted these attacks by pointing out that rotation requirements could still be added State by State. See *ante*, at 35-36.

But the majority's argument cuts both ways. The recorded ratification debates also contain no affirmative statement that the States *cannot* supplement the constitutional qualifications. While ratification was being debated, the existing rule in America was that the States could prescribe eligibility requirements for their delegates to Congress, see n. 3, *supra*, even though the Articles of Confederation gave Congress itself no power to impose such qualifications. If the Federal Constitution had been understood to deprive the States of this significant power, one might well have expected its opponents to seize on this point in arguing against ratification.

The fact is that arguments based on the absence of recorded debate at the ratification conventions are suspect, because the surviving records of those debates are fragmentary. We have no records at all of the debates in several of the conventions, 3 Documentary History of the Ratification of the Constitution 7 (M. Jensen ed. 1978), and only spotty records from most of the others, see *ibid.*; 1 *id.*, at 34-35; 4 Elliot 342; Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Texas L. Rev. 1, 21-23 (1986).

If one concedes that the absence of relevant records from the ratification debates is not strong evidence for either side, then the majority's only significant piece of evidence from the ratification period is Federalist No. 52. Contrary to the majority's assertion, however, this essay simply does not talk about "the lack of state control over the qualifications of the elected," whether "explicitly" or otherwise. See *ante*, at 27.

It is true that Federalist No. 52 contrasts the Constitution's treatment of the qualifications of voters in elections for the House of Representatives with its treatment of the qualifications of the Representatives themselves. As Madison noted, the Framers did not specify any uniform qualifications for the franchise in the Constitution; instead, they simply incorporated each State's rules about eligibility to vote in elections for the most numerous branch of the state legislature. By contrast, Madison continued, the Framers chose to impose some particular qualifications that all members of the House had to satisfy. But while Madison did say that the qualifications of the elected were "more susceptible of uniformity" than the qualifications of electors, The Federalist No. 52, at 326, he did not say that the Constitution prescribes anything but uniform minimum qualifications for congressmen. That, after all, is more than it does for congressional electors.

Nor do I see any reason to infer from Federalist No. 52 that the Framers intended to deprive the States of the power to add to these minimum qualifications. Madison did note that the existing state constitutions defined the qualifications of "the elected"—a phrase that the essay used to refer to Members of Congress—"less

three decades before the Twenty-sixth Amendment was proposed); *Harman v. Forssenius*, 380 U. S. 528, 539 (1965) (noting that by the time the Twenty-fourth Amendment was proposed, "only five States retained the poll tax as a voting requirement"); Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation 1571 (1973) (reporting that 11 States had adopted women's suffrage by the time the Nineteenth Amendment was proposed). Cf. *ante*, at 61, and n. 50.

carefully and properly" than they defined the qualifications of voters. But Madison could not possibly have been rebuking the States for setting unduly high qualifications for their representatives in Congress, because they actually had established only the sketchiest of qualifications. At the time that Madison wrote, the various state constitutions generally provided for the state legislature to appoint the State's delegates to the Federal Congress.²⁴ Four state constitutions had added a term-limits provision that tracked the one in the Articles of Confederation,²⁵ and some of the constitutions also specified that people who held certain salaried offices under the United States were ineligible to represent the State in Congress.²⁶ But only two state constitutions had prescribed any other qualifications for delegates to Congress.²⁷ In this context, when Madison wrote that the state constitutions defined the qualifications of Members of Congress "less carefully and properly" than they defined the qualifications of voters, he could only have meant that the existing state qualifications did not do enough to safeguard Congress' competence: the state constitutions had not adopted the age, citizenship, and inhabitancy requirements that the Framers considered essential. Madison's comments readily explain why the Framers did not merely incorporate the state qualifications for Congress. But they do not imply that the Framers intended to withdraw from the States the power to supplement the list of qualifications contained in the Federal Constitution.²⁸

Though Federalist No. 52 did not address this question, one might wonder why the Qualifications Clauses did not simply incorporate the existing qualifications for members of the state legislatures (as opposed to delegates to Congress). Again, however, the Framers' failure to do so cannot be taken as an implicit criticism of the States for setting unduly high entrance barriers. To the contrary, the age and citizenship qualifications set out in the federal Constitution are considerably higher than the corresponding qualifications contained in the state constitutions that were then in force. At the time, no state constitution required members of the lower house of the state legislature to be more than 21 years old, and only two required members of the upper house to be 30. See N. H. Const. of 1784, Pt. II, in 4 Thorpe 2460; S. C. Const. of 1778, Art. XII, in 6 Thorpe 3250.

²⁴See Del. Const. of 1776, Art. 11, in 1 Thorpe 564; Md. Const. of 1776, Form of Government, Art. XXVII, in 3 Thorpe 1695; Mass. Const. of 1780, Pt. 2, Ch. IV, in 3 Thorpe 1906; N. H. Const. of 1784, Pt. II, in 4 Thorpe 2467; N. Y. Const. of 1777, Art. XXX, in 5 Thorpe 2634-2635; N. C. Const. of 1776, Form of Government, Art. XXXVII, in 5 Thorpe 2793; Pa. Const. of 1776, Frame of Government, §11, in 5 Thorpe 3085; S. C. Const. of 1778, Art. XXII, in 6 Thorpe 3253; Va. Const. of 1776, in 7 Thorpe 3817.

²⁵Md. Const. of 1776, Form of Government, Art. XXVII, in 3 Thorpe 1695; N. H. Const. of 1784, Pt. II, in 4 Thorpe 2467; N. C. Const. of 1776, Art. XXXVII, in 5 Thorpe 2793; Pa. Const. of 1776, Frame of Government, §11, in 5 Thorpe 3085.

²⁶Md. Const. of 1776, Form of Government, Art. XXVII, in 3 Thorpe 1695; N. H. Const. of 1784, Pt. II, in 4 Thorpe 2467; Pa. Const. of 1776, Frame of Government, §11, in 5 Thorpe 3085.

²⁷See Md. Const. of 1776, Art. XXVII, in 3 Thorpe 1695; N. H. Const. of 1784, Pt. II, in 4 Thorpe 2467.

²⁸The majority suggests that I have overlooked Madison's observation that subject to the "reasonable limitations" spelled out in the House Qualifications Clause, the Constitution left the House's door "open to merit of every description." See *ante*, at 28, n. 18; see also *ante*, at 29 (quoting a similar passage from The Federalist No. 57). As discussed above, however, such statements do not advance the majority's case. See *supra*, at 38-39.

Many States, moreover, permitted naturalized aliens to take seats in the state legislature within one or two years of becoming citizens. See Kettner, Development of American Citizenship, at 214-219.

The majority responds that at the time of the Framing, most States imposed property qualifications on members of the state legislature. See *ante*, at 28, n. 18. But the fact that the Framers did not believe that a uniform minimum property requirement was necessary to protect the competence of Congress surely need not mean that the Framers intended to preclude States from setting their own property qualifications.

In fact, the constitutional text supports the contrary inference. As the majority observes, see *ante*, at 28, n. 18, and 47, n. 35, at the time of the framing some States also imposed religious qualifications on state legislators. The Framers evidently did not want States to impose such qualifications on federal legislators, for the Constitution specifically provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Art. VI, cl. 3. Both the context²⁹ and the plain language of the Clause show that it bars the States as well as the Federal Government from imposing religious disqualifications on federal offices. But the only reason for extending the Clause to the States would be to protect Senators and Representatives from state-imposed religious qualifications; I know of no one else who holds a "public Trust under the United States" yet who might be subject to state disqualifications. If the *expressio unius* maxim cuts in any direction in this case, then, it undermines the majority's position: the Framers' prohibition on state-imposed religious disqualifications for Members of Congress suggests that other types of state-imposed disqualifications are permissible. See Rotunda, Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution, 73 Ore. L. Rev. 561, 574 (1994).

4

More than a century ago, this Court was asked to invalidate a Michigan election law because it called for Presidential electors to be elected on a district-by-district basis rather than being chosen by "the State" as a whole. See Art. II, §1, cl. 2. Conceding that the Constitution might be ambiguous on this score, the Court asserted that "where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction[s] are entitled to the greatest weight." *McPherson v. Blacker*, 146 U. S., at 27. The Court then described the district-based selection processes used in 2 of the 10 States that participated in the first presidential election in 1788, 3 of the 15 States that participated in 1792, and 5 of the 16 States that participated in 1796. *Id.*, at 29-31. Though acknowledging that in subsequent years "most of the States adopted the general ticket system," *id.*, at 32, the Court nonetheless found this history "decisive" proof of the constitutionality of the district method. *Id.*, at 36. Thus, the Court resolved its doubts in favor of

²⁹The immediately preceding portion of the Clause requires not only "[t]he Senators and Representatives before mentioned" but also "the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States," to take an "Oath or Affirmation" to support the Constitution. Art. VI, cl. 3.

the state law, "the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken . . ." *Id.*, at 27.

Here too, state practice immediately after the ratification of the Constitution refutes the majority's suggestion that the Qualifications Clauses were commonly understood as being exclusive. Five States supplemented the constitutional disqualifications in their very first election laws, and the surviving records suggest that the legislatures of these States considered and rejected the interpretation of the Constitution that the majority adopts today.

As the majority concedes, the first Virginia election law erected a property qualification for Virginia's contingent in the Federal House of Representatives. See Virginia Election Law (Nov. 20, 1788), in 2 Documentary History of the First Federal Elections, 1788-1790, pp. 293, 294 (G. DenBoer ed. 1984) (hereinafter First Federal Elections) (restricting possible candidates to "freeholder[s]"). What is more, while the Constitution merely requires representatives to be inhabitants of their State, the legislatures of five of the seven States that divided themselves into districts for House elections³⁰ added that representatives also had to be inhabitants of the district that elected them. Three of these States adopted durational residency requirements too, insisting that representatives have resided within their districts for at least a year (or, in one case, three years) before being elected.³¹

In an attempt to neutralize the significance of the district residency requirements, respondent Hill asserts that "there is no evidence that any state legislature focused, when it created these requirements, on the fact that it was adding to the constitutional qualifications." Brief for Respondents Bobbie E. Hill et al. 20. But this claim is simply false.

In Massachusetts, for instance, the legislature charged a committee with drafting a report on election methods. The fourth article of the resulting report called for the State to be divided into eight districts that would each elect one representative, but did not require that the

representatives be residents of the districts that elected them. Joint Committee Report (Nov. 4, 1788), in 1 First Federal Elections 481. When the members of the State House of Representatives discussed this report, those who proposed adding a district residency requirement were met with the claim that the Federal Constitution barred the legislature from specifying additional qualifications. See Massachusetts Centinel (Nov. 8, 1788) (reporting proceedings), in 1 First Federal Elections 489. After "considerable debate," the House approved the committee's version of the fourth article by a vote of 89 to 72. *Ibid.* But the State Senate approved a district residency amendment, 1 First Federal Elections 502, and the House then voted to retain it, *id.*, at 504.

Although we have no record of the legislative debates over Virginia's election law, a letter written by one of the members of the House of Delegates during the relevant period indicates that in that State too the legislature considered the possible constitutional objection to additional disqualifications. In that letter, Edward Carrington (an opponent of the district residency requirement) expressed his view that the requirement "may exceed the powers of the Assembly," but acknowledged that there was "no prospect of its being struck out" because Federalists as well as Anti-Federalists at least professed to "think it right." 2 *id.*, at 367 (letter from Carrington to Madison, Nov. 9-10, 1788). Carrington was correct about the views of his colleagues: by a vote of 80 to 32, the House of Delegates rejected a motion to delete the added qualifications, while a similar motion in the State Senate lost by a vote of 12 to 3. *Id.*, at 287, 293.³²

The surviving records from Maryland and Georgia are less informative, but they too show that the legislatures of those States gave special attention to the district residency requirements that they enacted.³³ Out of the

³⁰ Despite the majority's emphasis on the Framers' supposed desire for uniformity in congressional elections, even the majority does not dispute that the Framers wanted to let States decide for themselves whether to use district elections in selecting Members of the House of Representatives. The Framers fully expected that in some States each Member of the House would be chosen by the people of the whole State, while in other States each Member would be directly accountable only to the people of a single district. See, e.g., 14 Papers of Thomas Jefferson 3 (J. Boyd ed. 1958) (letter from Madison to Jefferson, Oct. 8, 1788).

³¹ See Georgia Election Law (Jan. 23, 1789) (restricting representatives from each district to "resident[s] of three years standing in the district"), in 2 First Federal Elections 456, 457; Maryland Election Law (Dec. 22, 1788) (simple district residency requirement), in 2 First Federal Elections 136, 138; Massachusetts Election Resolutions (Nov. 20, 1788) (same), in 1 First Federal Elections 508, 509 (M. Jensen & R. Becker eds. 1976); North Carolina Election Law (Dec. 16, 1789) (requiring the person elected from each district to have been "a Resident or Inhabitant of that Division for which he is elected, during the Space or Term of one Year before, and at the Time of Election"), in 4 First Federal Elections 347; Virginia Election Law (Nov. 20, 1788) (requiring each candidate to have been "a bona fide resident for twelve months within such District"), in 2 First Federal Elections 293, 294. Upon being admitted to the Union in 1796, Tennessee also required its members in the Federal House of Representatives to have been Tennessee residents for three years and district residents for one year before their election. Act of Apr. 20, 1796, ch. 10, in Laws of the State of Tennessee 81 (1803).

³² After the Virginia Legislature had enacted this bill, some of James Madison's friends suggested that he might find it harder to win election in his own district than in certain other areas of the State. They believed that if Madison won the popular vote in one of those other districts, the House of Representatives could seat him on the theory that States cannot add to the constitutional qualifications. See 11 Papers of James Madison 378-379 (R. Rutland and C. Hobson eds. 1977) (letter from Carrington to Madison, Dec. 2, 1788). Other advisers, however, warned that the people of Virginia might not share this understanding of the Constitution. As Alexander White wrote in a letter to Madison:

"Some Gentlemen suppose you may be elected in other Districts, and that Congress would disregard the Act which requires Residence in a particular District. I will not undertake to decide that question, but this I know, such a determination would afford much ground of clamour, and enable the opposers of the Government to inflame the Minds of the People beyond anything which has yet happened." *Id.*, at 380 (Dec. 4, 1788).

Madison himself apparently never endorsed the idea that he should test the district residency requirement. Instead, he ran from his own district (where he overcame a stiff challenge from another future President, James Monroe).

³³ The records show that Maryland's House of Delegates put the district residency requirement to a separate vote and approved it by a margin of 41-24. 2 First Federal Elections 129-130 (summarizing proceedings from Dec. 3, 1788). A subsequent effort to jettison the requirement lost by a vote of 39-28. *Id.*, at 132-133 (summarizing proceedings from Dec. 10, 1788). Language in Maryland's second election law confirms that the state legislature knew that it was supplementing the Qualifications Clauses. The Act of December 10, 1790, stipulated that each candidate must "[b]e a resident of his district at the time of the election, and hav[e] resided therein twelve calendar months immediately before, and [be] otherways qualified

five original States that adopted district residency requirements, in fact, only in North Carolina were the records so poor that it is impossible to draw any inferences about whether the legislature gave careful attention to the implications of the requirement.³⁴

The majority asserts that "state practice with respect to residency requirements does not necessarily indicate that States believed that they had a broad power to add restrictions," because the States "may simply have viewed district residency requirements as the necessary analog to state residency requirements." *Ante*, at 49, n. 41. This argument fails even on its own terms. If the States had considered district residency requirements necessary for the success of a district election system, but had agreed with the majority that the Constitution prohibited them from supplementing the constitutional list of qualifications, then they simply would have rejected the district system and used state-wide elections. After all, the majority deems district residency requirements just as unconstitutional as other added qualifications. See *ante*, at 19.

The majority's argument also fails to account for the durational element of the residency requirements adopted in Georgia, North Carolina, and Virginia (and soon thereafter in Tennessee). These States obliged Congressmen not only to be district residents when

elected but also to have been district residents for at least a year before then. See n. 31, *supra*.

Finally, the majority's argument cannot explain the election schemes of Maryland and Georgia. Though these States did divide themselves into congressional districts, they allowed every voter to vote for one candidate from each district. See Georgia Election Law (Jan. 23, 1789), in 2 First Federal Elections 456, 457; Maryland Election Law (Dec. 22, 1788), in 2 First Federal Elections 136, 138. In other words, Maryland and Georgia imposed district residency requirements despite permitting every voter in the State to vote for every representative from the State. Neither of these States could possibly have seen district residency requirements as the "necessary analog" to anything; they imposed these requirements solely for their own sake.

The majority nonetheless suggests that the initial election laws adopted by the States actually support its position because the States did not enact very many disqualifications. See *ante*, at 49, n. 41. In this context, the majority alludes to the fact that no State imposed a religious qualification on federal legislators, even though New Hampshire continued to require state legislators to be Protestants and North Carolina imposed a similar requirement on people holding places of trust in the State's "civil department." See *ante*, at 49, n. 41, and 47, n. 35. But the majority concedes that "Article VI of the Federal Constitution . . . prohibited States from imposing similar qualifications on federal legislators." *Ante*, at 47, n. 35. As discussed above, the constitutional treatment of religious qualifications tends to undermine rather than support the majority's case. See *supra*, at 63.

The majority also points out that no State required its own federal representatives to rotate out of office after serving one or more terms. *Ante*, at 48-49. At the time of the framing, however, such requirements were increasingly disfavored on policy grounds. The advantages of incumbency were substantially fewer then than now, and turnover in office was naturally quite high. The perceived advantages of term limits were therefore smaller than they are today. But the perceived disadvantages were just as great: term limits prevented the States or the people of the States from keeping good legislators in office, even if they wanted to do so. See G. Wood, *Creation of the American Republic, 1776-1787*, p. 439 (1969).

It is true that under the Articles of Confederation, four States had imposed term limits on their delegates to Congress. See *ante*, at 48. But three of these provisions added nothing to the limits in the Articles themselves, see Md. Const. of 1776, Form of Government, Art. XXVII (echoing Article of Confederation V), in 3 Thorpe 1695; N. H. Const. of 1784, Pt. II (same), in 4 Thorpe 2467; N. C. Const. of 1776, Art. XXXVII (similar), in 5 Thorpe 2793, and the other one contained only a minor variation on the provision in the Articles, see Pa. Const. of 1776, Frame of Government, §11, in 5 Thorpe 3085. Indeed, though the majority says that "many States imposed term limits on state officers," *ante*, at 48, it appears that at the time of the framing only Pennsylvania imposed any restriction on the reelection of members of the state legislature, and Pennsylvania deleted this restriction when it adopted a new Constitution in 1790. Compare Pa. Const. of 1776, Frame of Government, §8, in 5 Thorpe 3084, with Pa. Const. of 1790, in 5 Thorpe 3092-3103; cf. Va. Const. of 1776, Form of Government (perhaps imposing term

according to the constitution of the United States." 1790 Laws of Maryland, ch. XVI, art. VIII.

In Georgia too the State House of Assembly called special attention to the district residency requirement. Shortly before Georgia held its first federal elections, the House adopted a resolution to stress that if the top vote-getter in any district had not been "an actual resident of three years standing" in that district, then "such person shall not be considered as eligible nor shall he be commissioned." 2 First Federal Elections 459 (resolution of Feb. 4, 1789).

³⁴Even the experience in New York and South Carolina—the only States that opted for district elections without requiring district residency—does not support the majority's position. While the records from South Carolina are sketchy, those from New York affirmatively undermine the majority's suggestion that the Qualifications Clauses were commonly understood to be exclusive. When the topic was first broached in the State Assembly, the assemblymen defeated a district residency proposal amid comments that "to add any other qualification [to those listed in the Constitution] would be unconstitutional." 3 First Federal Elections 232 (Dec. 18, 1788). But the State Senate took a different view, adding a district residency requirement when it considered the election bill. *Id.*, at 320. The Assembly then approved the requirement by a vote of 36-12, *id.*, at 325-326 (Jan. 19, 1789), but reconsidered the requirement the following day (apparently with more assemblymen in attendance). After a sophisticated debate on the constitutional question, with some assemblymen arguing that the district residency requirement was unconstitutional and others responding that the Constitution merely erected minimum qualifications, the Assembly divided evenly over the requirement: 28 voted in favor of it and 28 voted against it. *Id.*, at 328-335 (Jan. 20, 1789). The chairman broke the tie with a vote against the requirement. *Id.*, at 335. Still, there clearly was no consensus in the New York Assembly. What is more, some of the votes against the district residency requirement may well have been cast by assemblymen who simply opposed the requirement on policy grounds, as an undue restriction on the people's ability to elect nonresidents if they wanted to do so. In any event, the New York Senate obviously considered the requirement constitutional.

There is evidence that some members of the Pennsylvania legislature considered the Qualifications Clauses to be exclusive. See 1 *id.*, at 282-288. Of course, they also believed that §2 of Article I—which calls for Members of the Federal House of Representatives to be "chosen . . . by the People of the several States"—forbade Pennsylvania from electing its representatives by districts. See *id.*, at 283. The legislatures of the five States that adopted district-residency requirements, who had the Pennsylvania example before them, disagreed with the Pennsylvania legislators.

limits on members of the upper house of the state legislature), in 7 Thorpe 3816. It seems likely, then, that the failure of any State to impose term limits on its senators and representatives simply reflected policy-based decisions against such restrictions.

The majority counters that the delegates at three state ratifying conventions—in Virginia, New York, and North Carolina—“proposed amendments that would have required rotation.” *Ante*, at 34–35; cf. *ante*, at 48–49, and n. 40. But the amendments proposed by both the North Carolina convention and the Virginia convention would have imposed term limits only on the President, not on Members of Congress. See 4 Elliot 245 (North Carolina) (“[N]o person shall be capable of being President of the United States for more than eight years in any term of fifteen years”); 3 *id.*, at 660 (Virginia) (similar). If the majority is correct that these conventions also “voiced support for term limits for Members of Congress,” see *ante*, at 48,³⁵ then the evidence from these conventions supports my position rather than the majority’s: the conventions deemed it necessary for the Constitution itself to impose term limits on the President (because no State could do that on its own), but they did not think it necessary for the Constitution to impose term limits on members of Congress. This understanding at the Virginia and North Carolina conventions meshes with the election laws adopted by both States, which reflected the view that States could supplement the Qualifications Clauses. See *supra*, at 65, and n. 31.³⁶

If the majority can draw no support from state treatment of religious qualifications and rotation requirements, we are left only with state treatment of property qualifications. It is true that nine of the state constitutions in effect at the time of the framing required members of the lower house of the state legislature to possess some property, see *ante*, at 46, n. 33, and that four

of these constitutions were revised shortly after the framing but continued to impose such requirements, see *ante*, at 47, and n. 35. Only one State, by contrast, established a property qualification for the Federal House of Representatives. But the fact that more States did not adopt congressional property qualifications does not mean that the Qualifications Clauses were commonly understood to be exclusive; there are a host of other explanations for the relative liberality of state election laws.³⁷ And whatever the explanation, the fact remains that five of the election laws enacted immediately after ratification of the Constitution imposed additional qualifications that would clearly be unconstitutional under today’s holding. This history of state practice—which is every bit as strong as the history we deemed “decisive” in *McPherson v. Blacker*, 146 U. S., at 36—refutes the majority’s position that the Qualifications Clauses were generally understood to include an unstated exclusivity provision.

5

The same is true of the final category of historical evidence discussed by the majority: controversies in the House and the Senate over seating candidates who were duly elected but who arguably failed to satisfy qualifications imposed by state law.

As the majority concedes, “congressional practice has been erratic” and is of limited relevance anyway. *Ante*, at 40–41 (quoting *Powell v. McCormack*, 395 U. S., at 545). Actions taken by a single House of Congress in 1887 or in 1964 shed little light on the original under-

³⁵ The majority correctly notes that each convention, in addition to proposing a list of specific “Amendments to the Constitution,” proposed a “Declaration of Rights” to be appended to the Constitution. In both States, this “Declaration” contained the general exhortation that members of both the Legislative and Executive Branches “should, at fixed periods, be reduced to a private station, return into the mass of the people, and the vacancies be supplied by certain and regular elections.” 4 Elliot 243; 3 *id.*, at 657–658. But both Declarations went on to state that at these elections, the previous occupants of the office in question should “be eligible or ineligible [for reelection], as the rules of the constitution of government and the laws shall direct.” 4 *id.*, at 243; 3 *id.*, at 658. Accordingly, it is hard to describe either Declaration as a “proposed . . . constitutional amendment supporting term limits for Members of Congress.” See *ante*, at 49, n. 40.

³⁶ As for New York, the State’s ratifying convention did propose amending the Federal Constitution to provide “[t]hat no person be eligible as a senator for more than six years in any term of twelve years.” 1 Elliot 329–330. The majority finds it significant that when this suggestion fell on deaf ears, New Yorkers did not amend their State Constitution to impose this restriction on their state legislature’s appointment authority. Before the Seventeenth Amendment was adopted, however, the Federal Constitution vested the choice of Senators in the state legislatures rather than the people. See Art. I, §3, cl. 1. At least without a delegation of this authority from the legislature, cf. *supra*, at 39–43, and n. 16, the people of New York may well have thought that they could no more amend the State Constitution to narrow the legislature’s choices for Senator than they could amend the State Constitution to take the appointment of Senators entirely away from the legislature. It obviously would not follow that they doubted their ability to amend the State Constitution to impose constraints on their own choice of Representatives. The ratifying convention’s proposal thus sheds absolutely no light on whether New Yorkers considered the Qualifications Clauses to be exclusive.

³⁷ Property qualifications may simply have seemed unnecessary. For instance, it surely was far more likely that a pauper would secure one of the 202 seats in the South Carolina House of Representatives than that he would secure one of South Carolina’s five seats in the United States House of Representatives. Compare S. C. Const. of 1778, Art. XIII, in 6 Thorpe 3251 with U. S. Const., Art. I, §2, cl. 3; cf. S. C. Const. of 1790, Art. I, §3 (providing for a 122-seat State House of Representatives), in 6 Thorpe 3258. It may be significant, then, that the one State that saw fit to enact a congressional property qualification was also the State that had the largest congressional delegation. See U. S. Const., Art. I, §2, cl. 3 (allocating ten seats to Virginia). In addition, people of the day expected that “[t]he representatives of each State [in the federal House] . . . will probably in all cases have been members . . . of the State legislature.” The Federalist No. 56, at 348 (Madison); see also n. 17, *supra* (quoting article by John Stevens, Jr.). Because most States had property requirements for their state legislators, there may have been little perceived need for a separate property qualification for their Members of Congress.

Even States that wanted to create such a qualification, and that considered it within their constitutional authority to do so, might have been deterred by the possibility that the Federal House of Representatives would take a different view. As I have shown, there certainly was no general understanding that the Qualifications Clauses included an unstated exclusivity provision. But people of the day did consider this to be “one of the doubtful questions on which honest men may differ with the purest motives.” 14 Writings of Thomas Jefferson, at 83 (letter to Joseph C. Cabell, Jan. 31, 1814); see n. 14, *supra*. If some States feared that the “honest men” in the House might throw out the results of an election because of a qualifications law, they might well have thought that any policy benefits of such laws were outweighed by the risk that they would temporarily be deprived of representation in Congress. Alternatively, they may simply have wanted to stay away from difficult constitutional questions. Cf. *Ashwander v. TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Thus, despite concluding that the States do enjoy the power to prescribe qualifications, Thomas Jefferson questioned whether the advantages of added qualifications were sufficient to justify enacting a law whose constitutionality could be disputed. See 14 Writings of Thomas Jefferson, at 84.

standing of the Constitution. Presumably for that reason, the majority puts its chief emphasis on the 1807 debate in the House of Representatives about whether to seat Maryland's William McCreery. See *ante*, at 37-40. I agree with the majority that this debate might lend some support to the majority's position if it had transpired as reported in *Powell v. McCormack*. See *ante*, at 37-39. But the Court's discussion—both in *Powell* and today—is misleading.

A Maryland statute dating from 1802 had created a district entitled to send two representatives to the House, one of whom had to be a resident of Baltimore County and the other of whom had to be a resident of Baltimore City. McCreery was elected to the Ninth Congress as a resident of Baltimore City. After his reelection to the Tenth Congress, however, his qualifications were challenged on the ground that because he divided his time between his summer estate in Baltimore County and his residence in Washington, D. C., he was no longer a resident of Baltimore City at all.

As the majority notes, a report of the House Committee of Elections recommended that McCreery be seated on the ground that state legislatures have no authority to add to the qualifications set forth in the Constitution. See 17 Annals of Cong. 871 (1807); *ante*, at 37-38. But the Committee's submission of this initial report sparked a heated debate that spanned four days, with many speeches on both sides of the issue. See 17 Annals of Cong. 871-919, 927-947 (reporting proceedings from Nov. 12, 13, 16, and 18, 1807). Finally, a large majority of the House voted to recommit the report to the Committee of Elections. *Id.*, at 950 (Nov. 19, 1807). The Committee thereupon deleted all references to the constitutional issue and issued a revised report that focused entirely on the factual question whether McCreery satisfied the state residency requirement. *Id.*, at 1059-1061 (Dec. 7, 1807). After receiving the new report, the House seated McCreery with a resolution simply saying: "Resolved, That William McCreery is entitled to his seat in this House." *Id.*, at 1237 (Dec. 24, 1807). By overwhelming majorities, the House rejected both a proposal to specify that McCreery possessed "the qualifications required by the law of Maryland," *ibid.*, and a proposal to declare only that he was "duly qualified, agreeably to the constitution of the United States," *id.*, at 1231. Far from supporting the majority's position, the McCreery episode merely demonstrates that the 10th House of Representatives was deeply divided over whether state legislatures may add to the qualifications set forth in the Constitution.³⁸

³⁸ Though obliquely acknowledging this fact, the majority thinks it relevant that some subsequent commentators have mistakenly accepted the gloss put on the McCreery case by two editors in 1834. See *ante*, at 39-40 (citing treatises, each of which relies upon Cases of Contested Elections in Congress (M. Clarke & D. Hall eds. 1834)). But surely we need not accept an inaccurate view of history merely because it has appeared in print. The majority also cites Thomas Jefferson's hazy recollection of the McCreery case, see *ante*, at 39, without acknowledging Jefferson's conclusion that the States were free to supplement the Qualifications Clauses. See *supra*, at 31-32.

³⁹ Going into the November 1994 elections, eight States had adopted "pure" term limits of one sort or another. See Colo. Const., Art. XVIII, §9a; Mich. Const., Art. II, §10; Mo. Const., Art. III, §45(a); Mont. Const., Art. IV, §8; Ohio Const., Art. V, §8; Ore. Const., Art. II, §20; S.D. Const., Art. III, §32; Utah Code Ann. §20A-10-301. Eight other States had enacted "ballot access" provisions triggered by long-term incumbency or multiple prior terms in Congress. See Ariz. Const., Art. VII, §18; Ark. Const., Amtd. 73, §3; Calif. Elec.

The majority needs more than that. The prohibition that today's majority enforces is found nowhere in the text of the Qualifications Clauses. In the absence of evidence that the Clauses nonetheless were generally understood at the time of the framing to imply such a prohibition, we may not use the Clauses to invalidate the decisions of a State or its people.

III

It is radical enough for the majority to hold that the Constitution implicitly precludes the people of the States from prescribing any eligibility requirements for the congressional candidates who seek their votes. This holding, after all, does not stop with negating the term limits that many States have seen fit to impose on their Senators and Representatives.³⁹ Today's decision also means that no State may disqualify congressional candidates whom a court has found to be mentally incompetent, see, e.g., Fla. Stat. §§97.041(2), 99.021(1)(a) (1991), who are currently in prison, see, e.g., Ill. Comp. Stat. Ann., ch. 10, §§5/3-5, 5/7-10, 5/10-5 (1993 and West Supp. 1995), or who have past vote-fraud convictions, see, e.g., Ga. Code Ann. §§21-2-2(25), 21-2-8 (1993 and Supp. 1994). Likewise, after today's decision, the people of each State must leave open the possibility that they will trust someone with their vote in Congress even though they do not trust him with a vote in the election for Congress. See, e.g., R. I. Gen. Laws §17-14-1.2 (1988) (restricting candidacy to people "qualified to vote").

In order to invalidate §3 of Amendment 73, however, the majority must go farther. The bulk of the majority's analysis—like Part II of my dissent—addresses the issues that would be raised if Arkansas had prescribed "genuine, unadulterated, undiluted term limits." See Rotunda, 73 Ore. L. Rev., at 570. But as the parties have agreed, Amendment 73 does not actually create this kind of disqualification. See Tr. of Oral Arg. 53-54; cf. *ante*, at 51. It does not say that covered candidates may not serve any more terms in Congress if reelected, and it does not indirectly achieve the same result by barring those candidates from seeking reelection. It says only that if they are to win reelection, they must do so by write-in votes.

One might think that this is a distinction without a difference. As the majority notes, "[t]he uncontested data submitted to the Arkansas Supreme Court" show that write-in candidates have won only six congressional elections in this century. *Ante*, at 53, n. 43. But while the data's accuracy is indeed "uncontested," petitioners filed an equally uncontested affidavit challenging the data's relevance. As political science professor James S. Fay swore to the Arkansas Supreme Court, "[m]ost write-in candidacies in the past have been waged by fringe candidates, with little public support and extremely low name identification." App. 201. To the best of Professor Fay's knowledge, in modern times only two incumbent Congressmen have ever sought reelection as write-in candidates. One of them was Dale Alford of

Code Ann. §25003 (West Supp. 1994); Fla. Const., Art. VI, §4(b)(5), (6); N.D. Cent. Code §16.1-01-13.1 (Supp. 1993); Okla. Const., Art. II, §12A; Wash. Rev. Code §§29.68.015, 29.68.016 (1994); Wyo. Stat. §22-5-104 (Supp. 1994). In the 1994 elections, six more States—Alaska, Idaho, Maine, Massachusetts, Nebraska, and Nevada—enacted term-limit or ballot-access measures, bringing to 22 the total number of States with such provisions. See Pear, The 1994 Elections, N. Y. Times, Nov. 10, 1994, p. B7, Col. 4. In 21 of these States, the measures have been enacted by direct vote of the people.

Arkansas, who had first entered the House of Representatives by winning 51% of the vote as a write-in candidate in 1958; Alford then waged a write-in campaign for reelection in 1960, winning a landslide 83% of the vote against an opponent who enjoyed a place on the ballot. *Id.*, at 201-202. The other incumbent write-in candidate was Philip J. Philbin of Massachusetts, who—despite losing his party primary and thus his spot on the ballot—won 27% of the vote in his unsuccessful write-in candidacy. See *id.*, at 203. According to Professor Fay, these results—coupled with other examples of successful write-in campaigns, such as Ross Perot's victory in North Dakota's 1992 Democratic presidential primary—"demonstrate that when a write-in candidate is well-known and well-funded, it is quite possible for him or her to win an election." *Ibid.*

The majority responds that whether "the Arkansas amendment has the likely effect of creating a qualification" is "simply irrelevant to our holding today." *Ante*, at 59. But the majority—which, after all, bases its holding on the asserted exclusivity of the Qualifications Clauses—never adequately explains how it can take this position and still reach its conclusion.

One possible explanation for why the actual effect of the Arkansas amendment might be irrelevant is that the Arkansas Supreme Court has already issued a binding determination of fact on this point. Thus, the majority notes that "the state court" has advised us "that there is nothing more than a faint glimmer of possibility that the excluded candidate will win." *Ante*, at 53. But the majority is referring to a mere plurality opinion, signed by only three of the seven Justices who decided the case below. One of the two Justices who concurred in the plurality's holding that Amendment 73 violates the Qualifications Clauses did write that "as a practical matter, the amendment would place term limits on service in the Congress," but he immediately followed this comment with the concession that write-in candidacies are not entirely hopeless; his point was simply that "as a practical matter, write-in candidates are at a distinct disadvantage." 316 Ark., at 276; 872 S. W. 2d, at 364 (Dudley, J., concurring in part and dissenting in part). As a result, the majority may rely upon the state court only for the proposition that Amendment 73 makes the specified candidates "distinct[ly]" worse off than they would be in its absence—an unavailable proposition that petitioners have conceded.

In the current posture of this case, indeed, it would have been extremely irregular for the Arkansas Supreme Court to have gone any farther. Disputed questions of fact, in Arkansas as elsewhere, generally are resolved at trial rather than on appeal from the entry of summary judgment. See Ark. Rule Civ. Proc. 56.⁴⁰ Accordingly, the majority explicitly disclaims any

reliance on the state court's purported finding about the effect of Amendment 73. See *ante*, at 53, n. 44.

Instead, the majority emphasizes another purported conclusion of the Arkansas Supreme Court. As the majority notes, the plurality below asserted that "[t]he intent" of Amendment 73 was "to disqualify congressional incumbents from further service." 316 Ark., at 266, 872 S. W. 2d, at 357. According to the majority, "[w]e must, of course, accept the State Court's view of the purpose of its own law; we are thus authoritatively informed that the sole purpose of §3 of Amendment 73 was to attempt to achieve a result that is forbidden by the Federal Constitution." *Ante*, at 52.

I am not sure why the intent behind a law should affect our analysis under the Qualifications Clauses. If a law does not in fact add to the constitutional qualifications, the mistaken expectations of the people who enacted it would not seem to affect whether it violates the alleged exclusivity of those Clauses. But in any event, the majority is wrong about what "the State Court" has told us. Even the plurality below did not flatly assert that the desire to "disqualify" congressional incumbents was the sole purpose behind §3 of Amendment 73. More important, neither of the Justices who concurred in the plurality's holding said anything at all about the intent behind Amendment 73. As a result, we cannot attribute any findings on this issue to the Arkansas Supreme Court.

The majority suggests that this does not matter, because Amendment 73 itself says that it has the purpose of "evading the requirements of the Qualifications Clauses." See *ante*, at 54 (referring to the "avowed purpose" of Amendment 73). The majority bases this assertion on the Amendment's preamble, which speaks of "limit[ing] the terms of elected officials." See *ante*, at 52. But this statement may be referring only to §§1 and 2 of Amendment 73, which impose true term limits on state officeholders. Even if the statement refers to §3 as well, it may simply reflect the limiting effects that the drafters of the preamble expected to flow from what they perceived as the restoration of electoral competition to congressional races. See *infra*, at 85. In any event, inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters.

The majority nonetheless thinks it clear that the goal of §3 is "to prevent the election of incumbents." See *ante*, at 52, 60. In reaching this conclusion at the summary-judgment stage, however, the majority has given short shrift to petitioners' contrary claim. Petitioners do not deny that §3 of Amendment 73 intentionally handicaps a class of candidates, in the sense that it decreases their pre-existing electoral chances. But petitioners do deny that §3 is intended to (or will in fact) "prevent" the covered candidates from winning reelection, or "disqualify" them from further service.

⁴⁰ Even if one were inclined to believe that the Arkansas Supreme Court had departed from the usual practice and had purported to make a binding determination on a disputed issue of fact, we would not be foreclosed from examining the basis for that determination. To be sure, on direct review of a state court's judgment, we will not "conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings." *Hernandez v. New York*, 500 U. S. 352, 369 (1991) (plurality opinion). But that is only to say that we will review state-court findings under the "clear error" standard. *Ibid.*; accord, *id.*, at 372 (O'CONNOR, J., concurring in judgment); cf. *id.*, at 379 (STEVENS, J.,

dissenting) (identifying no standard of review, but arguing that the state court's decision should be reversed because its underlying factual findings were erroneous). In certain areas, indeed, this Court apparently gives quite little deference to the initial factfinder, but rather "exercise[s] its own independent judgment" about the factual conclusions that should be drawn from the record. See *Bose Corp. v. Consumers Union*, 466 U. S. 485, 501, and n. 17 (1984) (STEVENS, J.).

One of petitioners' central arguments is that congressionally conferred advantages have artificially inflated the pre-existing electoral chances of the covered candidates, and that Amendment 73 is merely designed to level the playing field on which challengers compete with them.

To understand this argument requires some background. Current federal law (enacted, of course, by congressional incumbents) confers numerous advantages on incumbents, and these advantages are widely thought to make it "significantly more difficult" for challengers to defeat them. Cf. *ante*, at 54. For instance, federal law gives incumbents enormous advantages in building name recognition and good will in their home districts. See, e.g., 39 U.S.C. §3210 (permitting Members of Congress to send "franked" mail free of charge); 2 U.S.C. §§61-1, 72a, 332 (permitting Members to have sizable taxpayer-funded staffs); 2 U.S.C. §123b (establishing the House Recording Studio and the Senate Recording and Photographic Studios).⁴¹ At the same time that incumbent Members of Congress enjoy these in-kind benefits, Congress imposes spending and contribution limits in congressional campaigns that "can prevent challengers from spending more . . . to overcome their disadvantage in name recognition." App. to Brief for State of Washington as *Amicus Curiae* A-4 (statement of former 10-term Representative William E. Frenzel, referring to 2 U.S.C. §441a). Many observers believe that the campaign-finance laws also give incumbents an "enormous fund-raising edge" over their challengers by giving a large financing role to entities with incentives to curry favor with incumbents. Wertheimer & Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1133 (1994). In addition, the internal rules of Congress put a substantial premium on seniority, with the result that each Member's already plentiful opportunities to distribute benefits to his constituents increase with the length of his tenure. In this manner, Congress effectively "fines" the electorate for voting against incumbents. Hills, 53 U. Pitt. L. Rev., at 144-145.

Cynics see no accident in any of this. As former Representative Frenzel puts it: "The practice . . . is for incumbents to devise institutional structures and systems that favor incumbents." App. to Brief for State of Washington A-3. In fact, despite his service from 1971 to 1989 on the House Administration Committee (which has jurisdiction over election laws), Representative Frenzel can identify no instance in which Congress "changed election laws in such a way as to lessen the chances of re-election for incumbents or to improve the election opportunities for challengers." *Ibid*.

At the same time that incumbents enjoy the electoral advantages that they have conferred upon themselves, they also enjoy astonishingly high reelection rates. As Lloyd Cutler reported in 1989, "over the past thirty years a weighted average of ninety percent of all House and Senate incumbents of both parties who ran for reelection were reelected, even at times when their own

party lost control of the Presidency itself." Cutler, *Now is the Time for All Good Men . . .*, 30 Wm. & Mary L. Rev. 387, 395 (1989); see also Kristol, *Term Limitations: Breaking Up the Iron Triangle*, 16 Harv. J. L. & Pub. Policy 95, 97, and n. 11 (reporting that in the 100th Congress, as many Representatives died as were defeated at the polls). Even in the November 1994 elections, which are widely considered to have effected the most sweeping change in Congress in recent memory, 90 percent of the incumbents who sought reelection to the House were successful, and nearly half of the losers were completing only their first terms. Reply Brief for Petitioners U. S. Term Limits, Inc., et al. 4, n. 5. Only 2 of the 26 Senate incumbents seeking reelection were defeated, see *ibid.*, and one of them had been elected for the first time in a special election only a few years earlier.

The voters of Arkansas evidently believe that incumbents would not enjoy such overwhelming success if electoral contests were truly fair—that is, if the government did not put its thumb on either side of the scale. The majority offers no reason to question the accuracy of this belief. Given this context, petitioners portray §3 of Amendment 73 as an effort at the state level to offset the electoral advantages that congressional incumbents have conferred upon themselves at the federal level.

To be sure, the offset is only rough and approximate; no one knows exactly how large an electoral benefit comes with having been a long-term Member of Congress, and no one knows exactly how large an electoral disadvantage comes from forcing a well-funded candidate with high name recognition to run a write-in campaign. But the majority does not base its holding on the premise that Arkansas has struck the wrong balance. Instead, the majority holds that the Qualifications Clauses preclude Arkansas from trying to strike any balance at all; the majority simply says that "an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand." *Ante*, at 54. Thus, the majority apparently would reach the same result even if one could demonstrate at trial that the electoral advantage conferred by Amendment 73 upon challengers precisely counterbalances the electoral advantages conferred by federal law upon long-term Members of Congress.

For me, this suggests only two possibilities. Either the majority's holding is wrong and Amendment 73 does not violate the Qualifications Clauses, or (assuming the accuracy of petitioners' factual claims) the electoral system that exists without Amendment 73 is no less unconstitutional than the electoral system that exists with Amendment 73.

I do not mean to suggest that States have unbridled power to handicap particular classes of candidates, even when those candidates enjoy federally conferred advantages that may threaten to skew the electoral process. But laws that allegedly have the purpose and effect of handicapping a particular class of candidates traditionally are reviewed under the First and Fourteenth Amendments rather than the Qualifications Clauses. Compare *Storer v. Brown*, 415 U.S., at 728-736 (undertaking a lengthy First and Fourteenth Amendment analysis of a California rule that denied ballot access to any independent candidate for Congress who had not severed his ties to a political party at least one year

⁴¹Former Representative William E. Frenzel describes the House Recording Studio as a sophisticated operation used "to prepare tapes of speeches and messages to voters." Frenzel explains: "Taxpayers pay for the facilities, the personnel that run them, the production costs, and the costs of distributing, by mail or otherwise, the tapes that members supply (from their taxpayer-funded expense accounts). These messages are widely disseminated by broadcasters, who can use them to fill air time at no cost to themselves." App. to Brief for State of Washington as *Amicus Curiae* A-5 to A-6.

prior to the immediately preceding primary election, or 17 months before the general election) with *id.*, at 746, n. 16 (dismissing as "wholly without merit" the notion that this rule might violate the Qualifications Clauses). Term-limit measures have tended to survive such review without difficulty. See, e.g., *Moore v. McCartney*, 425 U. S. 946 (1976) (dismissing an appeal from *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S. E. 2d 607, on the ground that limits on the terms of state officeholders do not even raise a substantial federal question under the First and Fourteenth Amendments).

To analyze such laws under the Qualifications Clauses may open up whole new vistas for courts. If it is true that "the current congressional campaign finance system . . . has created an electoral system so stacked against challengers that in many elections voters have no real choices," Wertheimer & Manes, *supra*, at 1133, are the Federal Election Campaign Act Amendments of 1974 unconstitutional under (of all things) the Qualifications Clauses? Cf. *Buckley v. Valeo*, 424 U. S. 1 (1976) (upholding the current system against First Amendment challenge). If it can be shown that nonminorities are at a significant disadvantage when they seek election in districts dominated by minority voters, would the intentional creation of "majority-minority districts" violate the Qualifications Clauses even if it were to survive scrutiny under the Fourteenth Amendment? Cf. *Shaw v. Reno*, ___ U. S. ___, ___ (1993) (slip op., at 17) ("we express no view as to whether [the intentional creation of such districts] always gives rise to an equal protection claim"); *id.*, at ___ (slip op., at 2) (STEVENS, J., dissenting) (arguing that States may draw district lines for the "sole purpose" of helping blacks or members of certain other groups win election to Congress). More generally, if "[d]istrict lines are rarely neutral phenomena" and if "districting inevitably has and is intended to have substantial political consequences," *Gaffney v. Cummings*, 412 U. S. 735, 753 (1973), will plausible Qualifications Clause challenges greet virtually every redistricting decision? Cf. *id.*, at 754 (noting our general refusal to use the Equal Protection Clause to "attemp[t] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States"); see also *Burns v. Richardson*, 384 U. S. 73, 89, n. 16 (1966) (finding nothing invidious in the practice of drawing district lines in a way that helps current incumbents by avoiding contests between them).

The majority's opinion may not go so far, although it does not itself suggest any principled stopping point. No matter how narrowly construed, however, today's decision reads the Qualifications Clauses to impose substantial implicit prohibitions on the States and the people of the States. I would not draw such an expansive negative inference from the fact that the Constitution requires Members of Congress to be a certain age, to be inhabitants of the States that they represent, and to have been United States citizens for a specified period. Rather, I would read the Qualifications Clauses to do no more than what they say. I respectfully dissent.

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No. 94-5707

SHARLENE WILSON, PETITIONER v. ARKANSAS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Syllabus

No. 94-5707. Argued March 28, 1995—Decided May 22, 1995

Petitioner was convicted on state-law drug charges after the Arkansas trial court denied her evidence-suppression motion, in which she asserted that the search of her home was invalid because, *inter alia*, the police had violated the common-law principle requiring them to announce their presence and authority before entering. The State Supreme Court affirmed, rejecting petitioner's argument that the common-law "knock and announce" principle is required by the Fourth Amendment.

Held: The common-law knock-and-announce principle forms a part of the Fourth Amendment reasonableness inquiry.

(a) An officer's unannounced entry into a home might, in some circumstances, be unreasonable under the Amendment. In evaluating the scope of the constitutional right to be secure in one's house, this Court has looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. Given the longstanding common-law endorsement of the practice of announcement, and the wealth of founding-era commentaries, constitutional provisions, statutes, and cases espousing or supporting the knock-and-announce principle, this Court has little doubt that the Amendment's Framers thought that whether officers announced their presence and authority before entering a dwelling was among the factors to be considered in assessing a search's reasonableness. Nevertheless, the common-law principle was never stated as an inflexible rule requiring announcement under all circumstances. Countervailing law enforcement interests—including, e.g., the threat of physical harm to police, the fact that an officer is pursuing a recently escaped arrestee, and the existence of reason to believe that evidence would likely be destroyed if advance notice were given—may establish the reasonableness of an unannounced entry. For now, this Court leaves to the lower courts the task of determining such relevant countervailing factors.

(c) Respondent's asserted reasons for affirming the judgment below—that the police reasonably believed that a prior announcement would have placed them in peril and would have produced an unreasonable risk that petitioner would destroy easily disposable narcotics evidence—may well provide the necessary justification for the unannounced entry in this case. The case is remanded to allow the state courts to make the reasonableness determination in the first instance.

317 Ark. 548, 878 S. W. 2d 755, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

JUSTICE THOMAS delivered the opinion of the Court.

At the time of the framing, the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. In this case, we hold that this

